SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

vs.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. a]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14,786

GENERAL MOTORS CORPORATION, Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petition for Review of, and to Set Aside, a Final Order of the National Labor Relations Board

Appendix to Petitioner's Brief—Filed January 30, 1962

[File endorsement omitted.]

[fol. 1] BEFORE THE NATIONAL LABOR RELATIONS BOARD, SEVENTH REGION

Case No. 7-CA-2560

GENERAL MOTORS CORPORATION AND INTERNATIONAL UNIO , UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO

RELEVANT DOCKET ENTRIES

1960

Jan. 7. Amended charge filed.
Jan. 27. Amended complaint and notice of hearing issued.
Feb. 4. Answer to amended complaint received.
Feb. 5. Petition to intervene received.
Feb. 18. Order transferring case to Board dated.
Sept. 23. Notice of hearing issued.

1961

Feb. 20. Board's Decision and Order issued.
Mar. 22. Charging party's motion for reconsideration and oral argument received.
Apr. 21. Statement and motion of Petitioner in opposition to applications for reconsideration received.
Apr. 28. Petitioner's telegram, renewing motion that applications for reconsideration be dismissed and found to be without merit dated.
Sept. 29. Board's Supplemental Decision and Order issued.

[fol. 2] BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMENDED CHARGE AGAINST EMPLOYER—GENERAL COUNSEL'S EXHIBIT 1(f)—Filed January 7, 1960

Charge Against Employer

Amended

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9(f), (g), and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space

Case No. 7-CA-2560

Date Filed 1-7-60

Compliance Status Checked by: EK

1. Employer Against Whom Charge Is Brought

Name of Employer
General Motors Corporation

Number of Workers Employed—350,000

Address of Establishment (Street and number, city, zone, and State)

Nine plants in Anderson, Bedford, Indianapolis, Kokomo, Marion and Muncie, Indiana

Type of Establishment (Factory, mine, wholesaler, etc.)

Manufacturing

Identify principal product or service.

Manufacture of automobile parts

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (List subsections)

(5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

[fol. 3] 2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

The employer refused by letter dated October 27, 1959, the request of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America made in writing and dated October 20, 1959, that it enter into collective bargaining upon the proposal of the said labor organization that a written agreement be entered into, supplementary to the subsisting collective bargaining agreement between the parties, providing for a form of union security covering the employees represented by the said labor organization in the above-mentioned plants commonly known as "agency shop" pursuant to which the said employees, and each of them, would be required as a condition of continued employment and whereby new employees, and each of them, would be required as a condition of employment after 30 days following the date of hire, whichever should be later, to pay a sum of money to the said labor organization equal to the initiation fee required of persons desiring to become members thereof and monthly, a sum equal to the dues required of members.

3. Full Name of Party Filing Charge (if labor organization, give full name, including local name and number)

International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW)

4. Address (Street and number, city, zone, and State)

8000 E. Jackson, Detroit 14, Michigan

Telephone No. Lo. 8-4000, Ext. 351

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization)

American Federation of Labor & Congress of Industrial Organizations—815 16th St., Washington 6, D. C.

6. Address of National or International, if any

(Street and number, city, zone, and State)

Telephone No. ——, ——

7. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Harold A. Cranefield, (Signature of representative or person filing charge), General Counsel

January 6, 1960

—, —. —, —.

Willfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U. S. Code, Title 18, Section 80).

[fol. 4] Before the National Labor Relations Board

Excerpts From Amended Complaint and Notice of Hearing Dated January 27, 1960—General Counsel's Exhibit 1(h)—Filed January 27, 1960

It having been charged by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, herein called the Union, that General Motors Corporation, herein called the Respondent, has been engaging in and is engaging in unfair labor practices affecting commerce, as set forth and defined in the National Labor Relations Act, 61 Stat. 136, as amended, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Amended Complaint and Notice of Hearing pursuant to Section 10 (b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8.

* * * * * * *

5. The Union is a labor organization within the meaning of Section 2(5) of the Act.

6(a). In 1958, the Board ruled that all such General Motors' employees in the categories specified in the bargaining unit described in paragraph 6 (b) below, as the result of a long history of collective bargaining between the Union and the Respondent, had come to constitute a single

company-wide multi-plant bargaining unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

6(b). All of Respondent's production and maintenance employees and mechanical employees in engineering department shops employed in the plants or facilities of Respondent covered by the National Agreement between the Union and the Company at which the Union has been certified as indicated in paragraph 6 (a) above, except employees of sales, accounting, personnel and industrial relations' departments, superintendents, general foremen, fore-[fol. 5] men and assistant foremen, and all other persons working in a supervisory capacity, including those having the right to hire or discharge and those whose duties include recommendations as to hiring or discharging (but not leaders), and those employees whose work is of a confidential nature, time study men, plant protection employees (but not to include maintenance patrolmen or fire patrolmen), all clerical employees, chief engineers and shift operating engineers in power plants, designing (drawing board), production, estimating and planning engineers, draftsmen and detailers, physicists, chemists, metalurgists, artists, designer-artists and clay plaster modelers, timekeepers, technical school students, indentured apprentices, and those technical or professional employees who are receiving training, kitchen and cafeterial help, employed in Respondent's numerous plants and facilities throughout the United States, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

7. The Union having been designated and selected by a majority of the employees in the unit set forth in paragraph 6 (b) above in elections conducted by the National Labor Relations Board by virtue of Section 9 (a) of the Act has been and now is the exclusive representative of all the employees in said unit and is so recognized by the Respondent for the purpose of collective bargaining in respect to pay, wages, hours of employment and other terms and conditions of employment.

8. The Respondent employs employees within the unit described in paragraph 6 (b) above, in nine plants in the cities of Anderson, Bedford, Indianapolis, Kokomo, Marion and Muncie in the State of Indiana.

9. On or about October 20, 1959, the Union requested Respondent to appoint a time and place for a meeting between the appropriate representatives of Respondent and the Union, for the purpose of collective bargaining concerning the exact terms of an agreement supplementary to the existing National Agreement between those two parties, whereby the employees represented by the Union [fol. 6] in Respondent's Indiana plants and facilities (not already members of the Union) and new employees hired thereafter should be required as a condition of continued employment after thirty days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay the Union a sum equal to the initiation fee at each of its local unions involved and monthly sums equal to the regular dues required of its members at each location.

10. On or about October 27, 1959, Respondent refused and continuously to date has refused to comply with the request of the Union, referred to in paragraph 9 above, stating that it is the opinion of Respondent that such an agreement would be violative of the Act.

11. Respondent, by the refusal to bargain as set forth in paragraph 10 above, has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and has refused to bargain and is now refusing to bargain with the Union and thereby did engage in and is now engaging in unfair labor practices within the meaning of Section 8 (a) (1) and (5) of the Act.

. . . . . .

13. The acts of the Respondent, described above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Act.

Please Take Notice that on the 10th day of February, 1960, at 10:00 A. M., Eastern Standard Time, in Room 1009, Industrial Building, 232 W. Grand River Avenue, Detroit, Michigan, a hearing will be conducted before a duly designated Trial Examiner of the Board on the allegations set forth in the Amended Complaint, at which time and

place you have the right to appear in person, or otherwise, and give testimony.

You Are Further Notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Direc-
[fol. 7] tor, acting in this matter as an agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Amended Complaint within ten (10) days from the service thereof and that, unless it does so, all of the allegations in the Amended Complaint shall be deemed to be admitted to be true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Amended Complaint and Notice of Hearing to issue against Respondent herein.

Dated at Detroit, Michigan, this 27th day of January, 1960.

/s/ Thomas Roumell, Regional Director National Labor Relations Board Seventh Region, 232 W. Grand River, Detroit 26, Michigan.

(Seal)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM ANSWER OF RESPONDENT GENERAL MOTORS CORPORATION TO AMENDED COMPLAINT—GENERAL COUNSEL'S EXHIBIT 1(j)—Filed February 4, 1960

Now comes General Motors Corporation, the Respondent in the above-entitled matter, and makes answer to the Amended Complaint herein as follows:

* * * * * * *

5. Respondent admits solely for the purposes of this proceeding the allegations set forth in paragraph 5 of the Amended Complaint.

6(a) Respondent admits the allegations set forth in paragraph 6(a) of the Amended Complaint.

[fol. 8] 6(b) Respondent admits the allegations set forth in paragraph 6(b) of the Amended Complaint.

7. Respondent admits the allegations set forth in paragraph 7 of the Amended Complaint.

8. Respondent admits the allegations set forth in paragraph 8 of the Amended Complaint.

9. Respondent admits that on or about October 20, 1959, the International Union, UAW-AFL-CIO, directed the request to the Respondent described in paragraph 9 of the Amended Complaint.

10. Respondent admits the allegations set forth in paragraph 10 of the Amended Complaint.

11. Respondent denies the allegations set forth in paragraph 11 of the Amended Complaint.

• • • • • • •

13. Respondent denies the allegations set forth in paragraph 13 of the Amended Complaint.

Respectfully submitted, General Motors Corporation, By /s/ Henry M. Hogan, General Counsel, 3044 West Grand Boulevard, Detroit 2, Michigan, /s/ Harry S. Benjamin, Jr., /s/ K. Douglas Mann, /s/ Eugene L. Hartwig, Of Counsel.

Dated: Detroit, Michigan, February 3, 1960.

[fol. 9] Certificate of Service (omitted in printing)

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 7-CA-2560

130 NLRB No. 54 D-1857 Indiana

GENERAL MOTORS CORPORATION AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO

DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD—
Filed February 20, 1961

DECISION AND ORDER

Upon charges duly filed by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, herein called UAW, the General Counsel of the National Labor Relations Board, by the Regional Director for the Seventh Region, issued a complaint and notice of hearing, dated December 14, 1959 [fol. 10] and an amended complaint and notice of hearing, dated January 27, 1960, alleging that the Respondent, General Motors Corporation, herein called GM, had engaged in and was engaging in certain unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, as amended. Copies of the complaint and notice of hearing, as amended were duly served upon the Respondent and the UAW.

The amended complaint alleges, in substance, that on or about October 27, 1959, GM refused and continuously to date has refused to comply with a request of the UAW, the exclusive representative of GM employees in an appropriate unit, to bargain concerning terms of an agreement supplementary to an existing agreement between the parties.

The Respondent's answer, in effect, admits the factual

allegations of the amended complaint, but denies the commission of any unfair labor practice.

On February 10, 1960, a hearing was held in Detroit, Michigan, before Trial Examiner Albert P. Wheatly. The General Counsel, the UAW, GM, and the Intervenor [1] appeared. In addition to testimony taken, all the parties entered into a stipulation of facts; they waived the preparation and issuance of an Intermediate Report, and agreed that this proceeding be transferred to the Board for findings of fact, conclusions of law, and a decision and order based on the pleadings and record made at the hearing. On February 18, 1960, the Board entered an order transferring this proceeding to it.

On October 27, 1960, the Board heard oral argument at Washington, D. C.

The General Counsel, GM, UAW, and the Intervenor appeared at oral argument and filed briefs. By leave [fol. 11] granted, the following filed briefs as *amicus curiae:* The Oil, Chemical and Atomic Workers International Union; Commercial Telegraphers' Union; AFL-CIO; Indiana State AFL-CIO, Indiana State Building and Construction Trades Counsil and Indiana Workers Protective Committee; American Federation of Labor and Congress of Industrial Organizations; United Steelworkers of America, AFL-CIO; National Manufacturers' Association; and the Retail Clerks International Association, AFL-CIO. Of the latter group, United Steelworkers of America, Commercial Telegraphers' Union, and Indiana State Building and Construction Trades Council also appeared and participated in the oral argument.

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[1] The Intervenor is a group of GM employees in the appropriate unit who are opposed to the UAW's proposed supplemental agreement. The intervention was limited to the filing of briefs and oral argument. 130 NLRB No. 54

Upon the basis of the pleadings, the stipulation of facts, and the entire record in the case, the Board makes the following:

Finding of fact

I. *The Business of the Respondent*

The Respondent, a Delaware Corporation with its principal business office located in Detrait, Michigan, maintains numerous plants and facilities in various states of the United States, including the State of Michigan, where it fabricates, manufactures, and assembles automobiles, automotive parts, and related products. Annually, the Respondent ships goods valued in excess of one million dollars from its plants and facilities within the State of Michigan directly to points located outside the State of Michigan. We find that the Respondent is engaged in commerce within the meaning of Act and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

II. *The Labor Organization Involved*

International Union, United Automobile, Aircraft and Ogricultural Implement Workers of America, UAW-AFL-CIO is a labor organization, within the meaning of Section 2(5) of the Act, admitting to membership employees of the Respondent.

[fol. 12] For the reasons more fully explicated in their separate opinions, a majority of the Board is agreed that the Respondent did not unlawfully refuse to bargain with UAW, and that the complaint should therefore be dismissed.

Order

It is Ordered that the complaint as amended herein be, and it hereby is, dismissed.

Dated, Washington, D. C.

Boyd Leedom, Chairman, Joseph Alton Jenkins, Member Arthur A. Kimball, Member National Labor Relations Board.

(Seal)

BOYD LEEDOM, Chairman, concurring:

As indicated above, the facts are not in dispute, the parties having stipulated to an agreed statement.

By letter of October 20, 1959, UAW requested GM to bargain concerning a proposal supplementary to their existing national agreement [2] under which the employees represented by UAW in nine GM plants in six Indiana cities (Anderson, Bedford, Kokomo, Indianapolis, Marion, and Muncie) and new employees hired thereafter would be required as a condition of continued employment after 30 days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay [fol. 13] to the UAW a sum equal to the initiation fee charged by each of its local unions involved and a monthly sum equal to the regular dues required of union members at each location.

By letter, dated October 27, 1959, GM answered, stating that as an "agency shop arrangement • • • as • • • detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request • • •."

The foregoing exchange of correspondence took place after a decision on June 19, 1959, by the Indiana Appellate Court, holding that an agency shop under which nonunion members are required, as a condition of employment, to pay the exclusive bargaining agent a fee, in the equivalent of dues, initiation fees and assessments paid by union members, was a legal union-security arrangement in the State

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[2] The national agreement, in effect from October 2, 1958, until August 31, 1961, and thereafter from year to year, provides for maintenance of membership and a union shop, except as follows:

> "(4b) Anything herein to the contrary notwithstanding, an employee shall not be required to become a member of, or continue membership in, the union, as a condition of employment, if employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment."

notwithstanding Indiana's Right-to-Work Law.[3] The Court reasoned that Indiana's Right-to-Work Law, unlike right-to-work statutes of other jurisdictions which specifically prohibit or restrict agency shop arrangements, only forbids arrangements requiring union membership, and, as [fol. 14] an agency shop does not require union membership, the Indiana statute did not apply to an agency-shop arrangement.[4]

Apart from the issue concerning the validity of an agency-shop arrangement, all facts necessary for proof of an 8(a)(5) violation are either stipulated or conceded. The Respondent admits that "the charging party * * * is the certified collective bargaining representative for all hourly-rate production and maintenance employees at the Respondent's aforementioned Indiana plant locations and

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[3] The Right-to-Work Law of the State of Indiana, the place of employment of the employees involved herein, provides in pertinent part (Burn's Ind. Statutes, Ann. § 40-2703 C. P. S., Acts of 1957, Ch. 19, Sec. 3):

> No corporation or individual or association or labor organization shall solicit, enter into or extend any contract, agreement or understanding written or oral, to exclude from employment any person by reason of membership or nonmembership in a labor organization, to discharge or suspend from employment or layoff any person by reason of his refusal to join a labor organization. * * * Any such contract, agreement, or understanding, written or oral, entered into or extended after the effective date of this Act, shall be null and void and of no force or effect. * * *

Section 14 (b) of the National Labor Relations Act provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Terriorial law.

[4] *Meade Electric Company* v. *Hagberg*, 159 N. E. 2d 408 (1959), 44 LRRM 2312.

services the employees whom it represents at each of these plants through its local union * * *" The parties stipulated that, for the purposes of this case, they do not "intend to raise or rely" upon a provision in the national agreement which purports in broad terms to preclude any requirement of further bargaining during the term of the agreement. The parties are in agreement that, if UAW'S proposal is lawful, the subject matter of the proposal constituted a mandatory subject for collective bargaining and that GM's refusal to bargain with respect to it would violate Section 8(a)(5); but that, if UAW's proposal is unlawful, GM had no legal obligation to bargain as to it.

Thus, the issue to be determined is whether UAW's proposal for an agency-shop arrangement to cover GM employees employed in the State of Indiana is a lawful proposal under the National Labor Relations Act, as amended.

As indicated, GM contends that UAW's proposed agency-shop clause is illegal under the provisions of Section 7, Section 8(a)(1), and Section 8(a)(3).[5]

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[5] Section 7 of the Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(1) and 8(a)(3), in relevant part, provides that: it shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude

[fol 15] More specifically, GM contends that the exercise of rights of employees under Section 7 of the Act, as amended in 1947, and particularly the right to refrain from assisting a labor organization is limited only by agreements requiring union membership as authorized in Section 8(a)(3). GM asserts that, because an agency shop requires non-union employees to contribute financial support to a labor organization and because, for the reasons it hereinafter indicates, an agency-shop arrangement does not meet the requirements of Section 8(a)(3), an agency-shop arrangement, if adopted, would interfere with the exercise of rights guaranteed in Section 7, and would therefore constitute a violation of Section 8(a)(1).

[fol. 16] GM further contends that the first proviso to Section 8(a)(3) spells out the only type of agreement, i.e., an agreement limited to conditioning continued employment upon membership in a labor organization, that may per-

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an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. * * * Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * *

missibly infringe upon rights guaranteed in Section 7 and not expose an employer to a violation of Section 8(a)(3). GM asserts that the first proviso to Section 8(a)(3) makes clear that to condition employment on anything other than membership in a labor organization is contrary to the statute. Finally, GM contends that, as UAW's proposal fails to meet the requirements of the first proviso to Section 8(a)(3), its proposal would afford GM no protection from the sweep of the basic no-discrimination provision of Section 8(a)(3) were it to enforce an agency-shop agreement against employees who refuse to pay support money, and thus the proposal is illegal.

On the other hand, the General Counsel and the UAW contend in substance that the first proviso to Section 8(a)(3) merely defines the outer limits of permissible union-security provisions and that the proviso encompasses within its scope lesser forms of union-security arrangements, including the agency shop which requires only the payment of the equivalent of dues and initiation fees but does not compel membership in a labor organization.

I agree with the Respondent, for the reasons set forth hereinafter, that the complaint should be dismissed. Although an "agency shop" agreement, such as that proposed by UAW, has been held to be lawful under the applicable law of Indiana, a "Right-to-Work" State, it is nevertheless, in my opinion, unlawful under the National Labor Relations Act in such a "Right-to-Work" State.

I reach this conclusion because, in my view, any union-security agreement, including one providing for an agency shop, necessarily interferes with the Section 7 right of employees to refrain from assisting a labor organization, [fol. 17] and encourages membership in a labor organization.[6] Such an agreement is therefore clearly unlawful

---

[6] As the record reflects, nonmembers would not be eligible to participate in union meetings, to vote on ratifications of agreements, or to vote on how their "support money" was to be spent. They would not be entitled as a matter of right to receive the Union's publication, or strike benefits, to participate in the Union's educational fund, or to have any of the other benefits guaranteed union members. Thus, although nonmembers would be required to pay to the UAW

under Section 8(a)(1) and (3), unless it is saved by the proviso to Section 8(a)(3) of the Act. That proviso permits an employer to make an agreement with a labor organization "to require as a condition of employment *membership* [emphasis supplied] therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later * * *". There is, however, no other provision in the Act which specifically legalizes the interference and encouragement inherent in an agency-shop arrangement, and the only question here is whether such an arrangement can be lawful under the National Labor Relations Act in a State like Indiana, where it is clear that an agreement requiring literal [fol. 18] membership[7] is prohibited by State law. To hold the agency shop lawful, one would have to conclude that Congress intended the word "membership" in Section 7 and 8(a)(3) to encompass not only literal membership,

---

the equivalent of the initiation fee and dues paid by members, they would be denied benefits, available to members, which would be available to them, without additional financial burden, if they become members. In these circumstances nonmembers would necessarily be encouraged to become members. For, as the courts have held, the existence of discriminatory benefits, based on union membership, "is inherently conducive to increased union membership * * * by increasing the number of workers who would like to join and/or their quantum of desire,"—even though the Union would reject all applicants for membership. *N. L. R. B.* v. *Gaynor News Co.*, 197 F. 2d 719, 722-723 (C. A. 2), affirmed 347 U. S. 17. If this is so when the union is closed, *a fortiori* is it so when as here the union is open. That the payment of money to a labor organization assists that organization is self-evident.

[7] By "literal membership" I mean the right of a union to require actual membership as a condition of employment, and a willingness to admit to membership all employees who tender the requisite initiation fees and dues; cf. *Union Starch & Refining Company*, 87 NLRB 779; *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17. Neither of these cases stands for the proposition that payment of initiation fees and dues can be required when literal membership cannot.

but also other relationships between employees and the union in the picture, while at the same time intending that the same word in Section 14(b) encompass only literal membership; or further, that Congress intended the word "membership" to mean one thing in Indiana and a different thing somewhere else. Such reasoning I am not prepared to accept. Thus, the conclusion is inescapable that an agency-shop arrangement whatever its status under Indiana law, cannot be lawful under the National Labor Relations Act in a State like Indiana where employment cannot lawfully be conditioned on literal membership.

In support of their contention that an agency-shop agreemen is lawful, the General Counsel and UAW rely on *Public Service of Colorado*, 89 NLBR 418, and *American Seating Co.*, 98 NLRB 800. Such reliance seems misplaced, as, unlike the instant matter, both cases involved a valid agreement, requiring membership as a condition of employment, which was protected under the first proviso to Section 8(a)(3); and neither case involved a "right-to-work" jurisdiction. Significantly, in both *Public Service* and *American Seating*, no legal impediment existed to preclude the parties from entering into the contracts requiring all employees to be union members, and they made such contracts. Thus they were free to waive in certain instances, as they did, the maximum requirement of union membership and to require in lieu thereof some lesser form of union security, such as an agency-shop clause.

The instant case is different in that, as indicated above, GM and UAW were not free under the National Labor Relations Act to require of Indiana employees union membership as a condition of employment, and so, they were not free to require, as a condition of employment of such employees, any lesser form of union security, such as an agency shop. For one cannot waive a right he does not have.

[fol. 19] Based on the foregoing considerations, I conclude that the agency-shop clause concerning which UAW requested GM to bargain is, under the National Labor Relations Act, illegal in Indiana, and that GM was under no obligation to negotiate concerning such a clause with UAW. Accordingly, GM not having violated the Act as alleged, the complaint should be dismissed.

Whether an agency-shop arrangement, such as that proposed herein, would be lawful in a non "right-to-work" State, is not before me and I express no opinion on that issue.

Dated, Washington, D. C.

Boyd Leedom, Chairman, National Labor Relations Board.

JOSEPH ALTON JENKINS, Member, concurring:

The parties stipulated to an agreed statement of or conceded to the facts herein.

The National Agreement between the parties, in effect from October 2, 1958, until August 31, 1961, and thereafter from year to year, provides for maintenance of membership and a union shop, except as to those employees "employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment." Application of the National Agreement is prohibited in Indiana by the Indiana Right-to-Work Law.[8]

[fol. 20] On June 19, 1959, the Indiana Appellate Court held the State Right-to-Work Law inapplicable to a provision requiring all employees as a condition of employment to pay their exclusive bargaining agent a fee in the equivalent of dues, initiation fees and assessments paid by union

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[8] The Right-to-Work Law of the State of Indiana provides in pertinent part:

> No corporation • • • or labor organization shall solicit, enter into or extend any contract, agreement or understanding written or oral, to exclude from employment any person by reason of membership or nonmembership in a labor organization, to discharge or suspend from employment or layoff any person by reason of his refusal to join a labor organization. • • • (Burn's Ind. Ann. Statutes § 40-2703 C. P. S., Acts of 1957, Ch. 19, Sec. 3).

Although the statute asserts the right of employees to assist or refrain from assisting a labor organization, contractual interference with this right is not specifically proscribed.

members in the bargaining unit. Following the well-settled rule that penal statutes are to be strictly construed, the Court refused to construe a penal statute expressly prohibiting the entering into or application of an agreement requiring membership to proscribe an agreement which required support monies, noting that [9]

> "• • • it would seem that the clear, unequivocal language of the Indiana act was intended to apply to union membership and not to outlaw 'agency shop' agreements which provide for the payment of fees and dues to labor organizations properly designated as collective bargaining representatives. Had the legislature intended to make such provisions and such conduct illegal it should have been so expressly declared in the language of the act."

On the ground that section 14(b) of the federal Act "specifically authorizes and recognizes the validity of Right-to-Work Laws of the several states," the Indiana Appellate Court found it unnecessary to consider the preemption problems which might arise were the State legislature also to attempt to regulate conduct encouraging membership in or assisting labor organizations representing employees engaged in an industry affecting commerce, that is conduct covered by provisions of the federal act other than the provisos to Sec. 8(a)(3).

On October 20, 1959, the UAW asked GM by letter to bargain with respect to its proposal for a supplemental agreement to apply to its employees in Indiana which would require "employees represented by UAW who were not already members and new employees hired thereafter" [fol. 21] "as a condition of continued employment after 30 days following the date of such supplemental agreement or their initial employment (which ever is later) to pay the UAW sums equal to the regular dues required of union members on such locations." The Union characterized this proposal as an "agency shop." The proposal was based on the terms found not unlawful under the Indiana Right-to-Work Law by the State Court, excluding assessments.

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[9] *Meade Electric Company v. Hagberg*, 159 N. E. 2d 408 (1959), 44 LRRM 2312, 2315-2316.

On October 27, 1959, GM replied by letter respectfully declining to schedule a meeting "to enter into such a supplemental agreement" on the ground that the "agency shop arrangement as * * * detailed in the letter of October 20, 1959" "would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement."

On October 29, 1959, the UAW filed charges alleging that this refusal violated Section 8(a)(1) and (5) of the Act. In answer to the complaints, GM admitted that it had refused to negotiate or enter into a contract on the ground that it believed the proposal violative of the Federal Act but denied that its refusal violated 8(a)(1) and (5).

At the hearing, the parties attempted further to clarify their positions. Both stipulated that they would not raise or rely upon a provision in the National Agreement intended to preclude requirement of further bargaining during the term of that agreement. UAW indicated that it would not change or modify the basic terms in its initial request during any subsequent bargaining conference which might be ordered, suggesting possible compromises on the length of the grace period afforded employees and similar matters as the only elements on which it might vary the proposal. GM indicated that it had no intention of expanding its reasons for refusing to negotiate or enter into the proposed supplemental agreement. Both parties agreed that they wanted a decision from the Board which definitely indicates "that an 'agency shop' under Taft-Hartley is either legal or illegal." At the request of the General Counsel, the Trial Examiner accepted the further stipulation [fol. 22] that all the parties waived any remedy requiring the posting of any notices by the Respondent.

Respondent introduced into evidence the Union's current Constitution and called Leonard Woodcock, Union Vice President in charge of the General Motors Department of the Union since 1955, to explain the comparative Union rights of members and nonmembers who would be required to pay the equivalent of a union initiation fee and monthly union dues under the Union's proposal. He testified that the nonmembers would not be eligible to participate in Union meetings, to vote on ratification of agreements entered into or negotiated by the Union on their behalf, or

to vote on how any of their "support money" was to be allocated by the Union. They would not be entitled as a matter of right to receive the Union's publication "Solidarity" nor would nonmembers have any guarantee that their payments would entitle them to strike benefits, participation in the Union's Educational Fund, or to any of the other benefits guaranteed union members, since, as he pointed out, "our constitution isn't written in terms of non-members."

NOT IN ISSUE

The agreemnt between the parties limits the issues to be considered by the Board. To eliminate possible doubt as to the import of this case for Board decisions involving Sections 8(a)(5) and 8(b)(3), I feel it incumbent upon me to state some questions which are *not* here in issue. This case does not involve the question of the extent to which an employer must bargain on a subject of mandatory bargaining if, but confronted with an initial illegal proposal thereon. Concededly "union security" is a subject of mandatory bargaining under the Act and the mere request for an illegal union security provision neither terminates the duty to bargain thereon nor itself constitutes a refusal to bargain.[10] Nor the question whether the Respondent's ex-[fol. 23] planation for its refusal to bargain on the "agency shop" proposal sufficed, without more, to fulfill its obligation to bargain thereon.[11] In view of the disagreement among the able attorneys involved in this proceeding and the Board itself, I cannot say that, right or wrong, the legal reason given for refusal was not urged in good faith.[12]

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[10] See *Andrew Jergens Co.*, 76 NLRB 363, 365, enfd. 175 F. 2d 130, 133 (C. A. 9, 1949), cert. den. 338 U. S. 827, and *National Maritime Union of America*, 78 NLRB 971, 981, enfd. 176 F. 2d 686 (C. A. 2, 1949), cert. den. 302 U. S. 753.

[11] See *The Cincinnati Steel Castings Company*, 86 NLRB 592, 594.

[12] Clearly, this is not a situation in which the Respondent urged legal reasons which it knew or should have known were not valid or in which other factors reflect on its good faith. See *The Andrew Jergens Company*, 76 NLRB 363, 379.

It is also clear that the Respondent's position did not evince a mind closed to persuasion or without sincere purpose to find the basis for agreement, which in fact the parties have sought through their agreement to submit to the Board for its resolution their dispute as to the legality of the UAW's so-called "agency-shop" proposal. It is only that dispute which must be resolved.

The Issue

As presented by the parties, the issue to be determined is the legality of incorporating into a contract and enforcing a provision requiring all GM employees (not already members of the Union) and all new employees in the State of Indiana to make payments in the equivalent of initiation fees and dues to UAW as a condition of continued employment. As stated by other participants in the proceeding, the issue was enlarged to include such questions as whether it would violate 8(a)(3) to agree to give employees an option to join the union or to pay "service charges" or be fired and whether the federal Act permits any form of "agency shop."

Neither the parties nor the other participants attempted rigidly to define an "agency shop" or to distinguish, with [fol. 24] any precision, among variations on "union shop" clauses,[13] incorporating "modifications" such as maintenance-of-membership during the contract term for those who choose during the grace period to remain or to become members, a requirement of membership by *all* employees *except* (1) those having conscientious objections to some of the uniformly imposed requirements for membership or to membership in any association including others than those

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[13] In sustaining the constitutionality of the 1951 amendment to the Railway Labor Act permitting a "union-shop" comparable to that provided in the provisos to 8(a)(3) of the Taft-Hartley Act, Justice Douglas stated for the Court:

> "The union shop is a variant of the closed shop, since union membership is required of every employee after the 60-day period designated by the Act."

Railway Employees' Department, AFL, et al. v. Hanson, et al., 351 U. S. 225 at 231, fn. 3 (1956).

of the religious body to which he belongs; (2) those older employees who have consistently rejected union membership; (3) those employees who prefer to contribute to some charity or to some particular union activity in lieu of joining the union, and the like. Such variations among "modified union-shop" clauses are legion.[14] There is similar variation among agreements characterized as establishing an "agency shop," [15] as the contentions in this proceeding clearly illustrate. Under these circumstances, I think it better to avoid use of the label "agency shop". [16]

[fol. 25] I shall therefore limit my basic consideration to the question of legality of the UAW's basic proposal. To repeat, that proposal, as stated in the request and in the complaints, reads:

> the employees represented by the Union in Respondent's Indiana plants and facilities (not already members of the Union) and new employees hired thereafter shall be required as a condition of continued employment after thirty days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay to the Union a sum equal to the initiation fee at each of the local unions involved

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[14] For variations, see *Union Contract Clauses*, CCH, Inc. (1954) par. 51,080; 51,080.28-.50; "Union Security and Checkoff," BNA, LRX 643-644.

[15] The definition of "agency shop" as one which obligates "employees who don't join the Union to pay the equivalent of dues for the union's services" merges with a definition of "modified union shop" as one which requires "some but not all employees to belong." This merger is apparent from the different emphasis placed upon the precedent cited to the Board as controlling herein.

[16] In sustaining the constitutionality of the Right-to-Work Amendment to the Nebraska Constitution and the North Carolina Right-to-Work Laws, Justice Black found similarly expedient the avoidance of references to "open," "closed," "union," "union-security" shops and provisions. See *Lincoln Federal Labor Union et al. v. Northwestern Iron and Metal Co., et al.*, and *Whitaker et al. v. North Carolina*, 335 U. S. 525, 528, at fn. 2 (1949).

and monthly sums equal to the regular dues required of its members at each location.

It is to be noted that, unlike the "modified union-shop" clauses listed above, the UAW's proposal is unrelated to any contractual requirement for union membership and without contractual specification of the employee's *option* to join or not to join. Although there are auxiliary questions, the ultimate issue is whether a certified bargaining representative may, without regard to any agreement requiring membership of any employee, condition the continued employment of non-members and new employees upon payments to it *for such representation* of sums equal to the initiation fees and monthly dues required by it of members for membership.

Statutory Provisions Involved in Contentions

Section 7, as amended, guarantees employees the right to "form, join, or assist labor organizations" and "the right to refrain from any or all such activities except to the extent that such right may be affected *by an agreement requiring membership* in a labor organization as a condition of employment as authorized in Section 8(a)(3)." Section 8(a)(3) prohibits "discrimination" in regard to any term or condition of employment "to encourage or discourage *membership* in any labor organization," with a proviso that [fol. 26] "nothing in this Act shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined • • • as an unfair labor practice) to require as a condition of employment *membership* therein" and further provides that "no employer shall justify any discrimination against an employee for non-membership in a labor organization" if "(A) he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to *other members*, or (B) if he has reasonable grounds for believing that *membership* was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining *membership*." (Italics added.)

CONTENTIONS OF THE PARTIES

GM contends that UAW's proposed "agency shop" clause, if adopted and made effective, would cause it to violate Sections 8(a)(3), 8(a)(1) and to interfere with rights accorded individual employees by Section 7 of the Act, as amended in 1947.

GM asserts that the first proviso to Section 8(a)(3) spells out the only type of agreement which may affect the right of employees guaranteed in Section 7, i. e., one conditioning continued employment on "membership." It contends that the UAW proposal would cause it to discriminate against employees for failure to assist a labor organization, with regard for "membership" or "non-membership" or the availability to the employees of membership, interfering with a right guaranteed in Section 7 and expressly qualified only by an "agreement requiring membership as authorized in section 8(a)(3)." It further contends that requiring nonmember employees to contribute the *same* financial support to the Union as may, under Section 8(a)(3)(B), be *exacted* as a condition of employment from members or required to be *tendered* by non-members as a condition of establishing job rights protected despite [fol. 27] nonmembership under the existing National Agreement where applicable, would penalize their refusal to join or illegally encourage their joining because members acquire benefits under the Union Constitution denied to nonmembers in bargaining units represented by the UAW. Finally GM contends that UAW's proposal fails to afford it protection from the broad sweep of the basic no-discrimination provision of 8(a)(3) were it to discharge employees who refuse to pay support money rather than "for nonmembership" which the statute states can be justified under certain conditions. GM asserts this is a case of first impression.

On the other hand, the General Counsel and the UAW contend that the first proviso to Section 8(a)(3) merely defines the outer limits of permissible union-security provisions and that the proviso encompasses within its scope lesser forms of union-security arrangements, including the "agency shop" which requires only the payment of the equivalent of dues but does not *compel* membership in a labor organization. They rely on two cases: *Public Service*

of Colorado, 89 NLRB 418 (1950), and *American Seating Co.*, 98 NLRB 800 (1952).

Other participants assert that the first proviso to Section 8 (a)(3) delimits the maximum permissible reach of union-security provisions, but contend that proviso (B) has, in its application, equated the tender of initiation fees and dues with the maximum requirements of "membership" making the equivalent exaction without regard for membership as legal. Further policy arguments relate to the impact upon labor organizations in the so-called Right-to-Work states of the problem of "free riders."

Proponents of both positions rely on various statements in the Board and Court decisions in *Union Starch and Refining Company*, 87 NLRB 779 (1949), and *N.L.R.B. v. Radio Officers' Union of the Commercial Telegraphers' Union, AFL, et al.*, 347 U.S. 17 (1954).

[fol. 28] DISCUSSION

Introduction

The precise issue before the Board is a very narrow one. The Board is *not* dealing with a situation where the proposed agreement *requires* either *membership* in *or support money payments by an employee who elects, pursuant to a contractual option, not to join a union.* I would find such an agreement legal under Section 8(a)(3). Having found such an agreement legal under the federal Act, I would then be required, by Section 14 (b) of the Act,[17] to look to the law

[17] Sec. 14 (b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Explicating the interrelation between state and federal law regulating union-security agreements under the Wagner and Taft-Hartley Acts, Justice Frankfurter stated:

> "The contention that §10 (a) of the Wagner Act swept aside State law respecting the union shop must

of the state where the agreement was made or applied to determine its validity under State law.[18] As both must be looked at, it is immaterial whether the Board looks first to the State law or to the Federal Act. The Board is *not* dealing with a situation where the proposed agreement "explicitly deals with *membership* in a union as a condition [fol. 29] of employment" as a requirement or as an option to a related requirement. It is *not* dealing with a situation in which an employer seeks to justify what would otherwise be "discrimination" by reason of the existence of an agreement *requiring membership*. It is confronted here with a provision which would require all nonmembers and new employees *as a condition of employment* to pay the equivalent of full initiation fees and dues. As *membership* is not involved as a requirement for or condition of employment, §8(a)(3) may be read without reference to any proviso.[19] In this context, "[t]he unfair labor practice is for an employer to encourage or

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therefore be rejected. If any provision of the Act had that effect, it could only have been §8 (3), which explicitly deals with *membership* in a union as a condition of employment * * * States are left free to pursue their own *more restrictive* policies in the matter of union-security agreements. 'Because §8 (3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, §14 (b) was included to forestall the inference that federal power was to be exclusive." *Algoma Plywood & Veneer Company v. Wisconsin Employment Relations Board*, 336 U. S. 301, at 306-307, 314. (Emphasis added.)

[18] *Colgate-Palmolive-Peet Co. v. N. L. R. B.*, 338 U. S. 355, 361 (1949).

[19] "The meaning of the statute in its application to different circumstances may be debatable. Clearly §8 (a)(3) may be read thus: It shall be an unfair labor practice for an employer to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment." *N. L. R. B. v. Int. Brotherhood of Teamsters*, 196 F. 2d 1, 4 (C.A. 8, 1952), reversed on another point 347 U. S. 17.

discourage membership by means of discrimination."[20] There can be no doubt that disparate conditioning of further employment upon payment of certain monies is clearly discriminatory.[21] It is as clear that such discrimination tends to encourage membership by non-members and new employees and maintenance of membership by present members, and to discourage membership in any other union, in violation of Section 8(a)(3). Consequently, the proposal advanced by the Union in this case is a proposal which does not have the sanction of Federal law.

[fol. 30] *Analysis of precedents cited*

For the reasons stated above, the provisos to §8(a)(3) are not involved in this case. Three of the chiefly cited cases turn on such provisos: *Public Service, American Seating*, and *Union Starch*.

In the *Public Service* case, the Board found no unlawful discrimination under Section 8(3) of the Wagner Act where an employee whose tender of initiation fees and dues in application for union membership had been rejected and who subsequently becoming delinquent in his "support money" payment, was discharged under a contract which provided for a dues' equivalent in support-money *as to all employees not covered by the maintenance-of-membership clause*. The Board did not consider the impact which the Taft-Hartley amendments incorporated on Section 7, the provisos to 8(a)(3), or 14(b) would have on the range of permissible union-security provisions, because the saving clause in Section 102 was operative. That was a Wagner Act case in which an employee was discharged for refusal to support a union which had denied him membership for

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[20] *Radio Officers' Union v. N. L. R. B., et al.*, 347 U. S. 17, 42 (1954). This statement of the reading to be given the language of §8(a)(3) depended, of course, on the fact that no issue considered related to the validity of a union-security contract or discriminations a valid union-shop contract might sanction.

[21] *Id.* at 39, where the Court lists a "clearly discriminatory": "involuntary reduction of seniority, refusal to hire for an available job, and disparate wage treatment."

an unascertained reason other than his refusal to tender appropriate monies. The decision is not relevant for the purpose of construing either the main clause or first proviso to Section 8(a)(3) of the Act. Were the option to join or to pay the equivalent in dues for support one free to the employee to make, he would be protected against such reprisal by proviso (A) or (B) to Section 8(a)(3) of the Act. This is apparent from the decision in *Union Starch* protecting from discharge employees similarly denied *membership* upon the tender of such monies.

In the *American Seating* case, the Board permitted as a bar to an election a contract which required all employees covered by the contract, except those having religious objections to union membership, to become or remain members of the union and required all such religious objectors to pay to the union a monthly sum equivalent to the amount of union dues. The contracting parties in both those cases were free to enter into a contract requiring as a condition of employment union membership, and did so. [fol. 31] Neither case involved support monies for the representative from employees within the bargaining unit apart from some "agreement requiring membership." In both, the same contractual sanction was imposed against the member who failed to pay dues as was imposed against the nonmember who failed to make support money payments. Both acknowledged a distinction between the obligations of members to the labor organization of which they are members and of nonmembers represented by that labor organization in a unit which includes members.

I do not question the basis for either decision, merely the relevance of either as a guide to decision of the issues in this case. There is no clue in the *Public Service* decision that the *alternatives* were open to all employees within the bargaining unit. If membership were not equally available to all employees upon uniform terms the contractually afforded option might in itself, under the *Radio Officers'* decision, illegally "encourage membership."[22] In *American Seating*, the ground for exoneration from the obligation

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[22] *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, at 51-52.

of membership cannot be viewed as tending to encourage or discourage union membership. The option was with the employee and based on a nondiscriminatory consideration unrelated to union membership. The important distinction between both cases and the present case is both did involve *explicit* contractual *requirements* for *membership*, and the alternatives were related thereto.

Unlike *Public Service* and *American Seating*, the valid union security agreement *requiring membership* in *Union Starch* afforded no alternatives to "membership" for the employee. As the employer had reasonable grounds for believing that membership was denied certain employees for "reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership," the question was whether the further proviso (B) to Sec. 8(a)(3) protected an employee who had made such tender from discharge for nonmembership. In a decision which con- [fol. 32] siders at length the legislative history of the provisos to Sec. 8(a)(3), the Board concluded that proviso (B) protects the employee who tenders the requisite amount of dues and initiation fee and is denied membership for any other reason, even though that reason be nondiscriminatory. It concluded that if a union "imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job."[23] While

[23] See summary of holdings in *Union Starch & Refining Co. v. N. L. R. B., et al.*, 186 F. 2d 1008, 1011-1012 (C. A. 7, 1951), cert. den. 342 U. S. 815. In conclusion, the Court stated (at 1012):

> "We agree that the Union had the right, under the statute here involved to prescribe nondiscriminatory terms and conditions for acquiring membership in the Union, but we are unable to agree that it may adopt a rule that requires the discharge of an employee [pursuant to a valid union-security provision] for reasons other than the failure of the employee to tender the periodic dues and initiation fees. We think the Board construed the statute in a reasonable manner and gave

this gives the employee the privilege of refusing with impunity to comply with additional requirements for membership, or of membership, it cannot be said to equate "membership" with the payment of periodic dues and initiation fees.[24] That decision has even less relevance for the present problem than those cases involving contractual alternatives to required membership.

While *Radio Officers' Union* contains a careful analysis of the problem of encouragement of union membership by employers, within the meaning of Section 8(a)(3), none of the discriminatory situations[25] therein found to encourage [fol. 33] adherence to union obligations or to tend to encourage the desire for union "membership" involved any contractual obligation imposed upon employees as a condition for their continued employment. That decision becomes relevant here as a guide to the proper interpretation to be given such generic phrases. It is pertinent here that the Court there stated the limits to "permissible encouragement" of "membership" by reference to *contractual requirements for membership* and in the context of the purposes of the provisos to Section 8(a)(3) thusly:[26]

> "*The policy of the Act is to insulate employees' jobs from their organizational rights.* Thus § 8(a)(3) and 8(b)(2) were designed to allow employees to freely

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effect to all its provisions, and that its interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees, and that the Board was justified in its conclusions."

[24] To do so, absent the labor organization's decision to that effect, ignores proviso (A) and the proviso to Section 8 (b)(1)(A).

[25] I. e., involuntary reduction of seniority for delinquent dues payments by a member, refusal to hire for an available job a member who sought employment without seeking clearance from the union and who was thereafter refused such clearance by the union, disparate wage treatment of union members and nonmembers.

[26] *Radio Officers' Union* v. *N.L.R.B.*, 347 U. S. 17, 40-42 (1954).

exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. *The only limitation Congress has chosen to impose on this right is specified in the proviso to §8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership 'was not available* to the employee on the same terms and conditions generally applicable to other members' *or if 'membership was denied or terminated for reasons other than the failure of the employee to tender periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.*[41] Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus *Congress* recognized the validity of unions' concern about 'free riders,' i. e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and *gave unions the power to contract to meet* [fol. 34] *that problem while withholding from unions the power to cause the discharge of employees for any other reason. Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union security if the other requirements of the proviso are met. No other discrimination aimed*

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[41] • • • That Congress intended §8(a)(3) to proscribe all discrimination to encourage union membership not excepted by the proviso see H. Cong. Rep. No. 510, 80th Cong., 1st Sess. 14, where it is stated that §8(a)(3) "prohibits an employer from discriminating against an employee by reason of his membership or nonmembership in a labor organization, *except to the extent he obligates himself to do so under the terms of a permitted union shop or maintenance of membership* contract." [Emphasis supplied.]

at encouraging employees to join, retain membership, or stay in a union is conditioned. [Emphasis supplied.]

I have set forth in its entirety that portion of the opinion relied upon, with benefit from partial quotation, both by those who contend the UAW proposal valid and those who contend it illegal under the Act. In my opinion, this statement of the limits to permissible encouragement of union membership restricts unions, in contractually guaranteeing their own financial security against "free riders," to agreements of the type contemplated by Congress, i.e., "a permitted union shop" or "maintenance of membership contract," both being agreements explicitly "requiring membership." However, the Court in the *Radio Officers'* case was not passing upon the vali lity of a contract conditioning continued employment of employees who were not members of the contracting union and new employees upon their payment to such union of monies equivalent to regular initiation fees and dues.

[fol. 35] CONCLUSION

Section 8(a)(3) of the National Labor Relations Act makes unlawful any contract term which illegally encourages or discourages union membership, *specifically permitting* (unless prohibited by State law) *agreements "requiring union membership* as a condition of continued employment" *under careful controls to guarantee that the union will be open to all who seek membership on the same terms and specifying the sole reason for which an employee may be discharged for "non-membership,"* i.e., his failure to tender the periodic dues and initiation fees uniformly required "as a condtiion of acquiring or retaining membership."[27]

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[27] The Board with judicial approval has construed the phrase, "membership in a labor organization" to mean "membership" as that phrase is commonly construed and understood. *Union Starch & Refining Co. v. N. L. R. B.*, 186 F. 2d 1008, 1011-1012 (C. A. 7, 1951), cert. den. 342 U. S. 815, enfg. 87 NLRB 779 (1949). To hold otherwise is to torture the clear and unambiguous words of the statute or not to give effect to all of its provisions. E. g., Sections 7, 8 (a)(3), 8 (b)(1)(A), 8 (a)(2), 8 (b)(5), 8 (b)(f), 14(a),

Such statutory protection of "individual employees in their relations with labor organizations" to job rights affords a union no right to financial security through support monies from nonmembers whom it represents in a unit *not* covered by a contract "requirnig *membership*."

It is one thing, where there is in existence a valid union-securtiy agreement requiring membership, to allow an employee, at his option, not to become a member if he makes [fol. 36] uniform payments in support of representation by his representative. It is quite another thing, when he cannot be required to become a member, to require such support from him.

As the Supreme Court has noted, "It is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action." [28] I can only conclude that the UAW proposal which would exact from *all* nonunion members and new employees in the bargaining unit, without regard for their obligations or election as to joining the union, the very same sums the Act sanctions as exactions which may be required from *members* as a condition of continued employment pursuant to a valid union-shop agreement can have no other foreseeable consequence than tending to encourage membership in the UAW or discourage membership in any other union.

14(b), 302—all of which contain references either to "members" or "membership" in labor organizations. There is no need to cite the authorities which support such an approach to the problem of interpretation to be given statutory terms having common meaning. As Justice Burton has stated, "the essential element of *membership* in an organized group" is the "desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member." *Jencks v. United States*, 353 U. S. 657, 679 (1957). This is in accord with the statutory definition of "member" contained in Section 3(o) of the Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86-257; 73 Stat. 519), i.e., "any person who has fulfilled the requirements for membership in such organization."

[28] *Radio Officers' Union v. N.L.R.B., et al.*, 347 U. S. 17, 51 (1954).

Realistically considered, the UAW sought a contract provision which, consistent with the prohibition within the State of contracts requiring membership, would nevertheless impose upon nonmembers and new employees the financial burden of supporting it as their representative and to the same extent it could impose such burden upon all employees it represents within a bargaining unit covered by a union-shop provision, valid both under Federal and State law. This is tantamount to charging for representation, contrary to the rights of a bargaining representative required "not to discriminate in the execution of its duties between its own members and employees who belong to another union or to no union." As the Court stated in *Hughes Tool Company v. N.L.R.B.*:[29]

> The Act makes no provision for paying the bargaining representative. When a union serves as such, it looks for its financial support to the agreement of its members to pay dues * * * It must serve all em- [fol. 37] ployees alike as their representative and secure itself in its office of representative only by the skill, efficiency, and fairness with which it executes that office.

Based on these considerations, I conclude that the particular clause concerning which UAW requested GM to bargain was illegal and GM is under no obligation to negotiate thereon. Accordingly, finding that GM has not violated the Act as alleged, I join Chairman Leedom and Member Kimball in dismissing the complaint.

Dated, Washington, D. C.

Joseph Alton Jenkins, Member National Labor Relations Board.

ARTHUR A. KIMBALL, Member, concurring:

I concur in the ultimate result reached by Chairman Leedom and Member Jenkins, and in agreement with them, I would dismiss the complaint herein which alleges a violation of Section 8(a)(5) of the Act.

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[29] 147 F. 2d 69, 74-75 (C. A. 5, 1945), cited with approval in *Conley, et al. v. Gibson, et al.*, 355 U. S. 41, 46 (1957).

I also agree with their conclusion that the so-called agency shop contract which the Union sought to negotiate with Respondent, does not fall within the mandatory field of collective bargaining. It would not fall within the protection of the proviso to Section 8(a)(3) of the Act, and thus would constitute a violation of Section 8(a)(1) and (3), as well as unlawful interference with the employees in the exercise of their rights guaranteed in Section 7 of the Act.

I would further find that the granting of such a contract would constitute unlawful assistance to the labor organization in violation of Section 8(a)(2) of the Act, and a discharge requested by the Union thereunder and honored by the Employer would constitute violations of 8(b)(2), 8(a)(1) and 8(a)(3) of the Act.

I am in agreement with so much of the rationale in the separate opinions of Chairman Leedom and Member Jenkins which supports the aforesaid conclusions of law.

[fol. 38] However, in view of the extreme importance of the question presented by the instant case and its impact upon the broad field of labor relations, I feel I should set forth in some detail my principal ground in support of my ultimate decision to dismiss the complaint herein.

The facts of record in the instant case upon which I rely and which I will treat with hereinafter, are as follows:

Respondent introduced into evidence the Union's current constitution and called Leonard Woodcock, union vice-president in charge of the General Motors Department of the Union since 1955, to explain the comparative union rights of members and support money employees who would be required to pay the equivalent of a union initiation fee and monthly union dues under the Union's proposal. He testified that the support money employees would not be eligible to participate in union meetings, to vote on ratification of agreements entered into or negotiated by the Union on their behalf, or to vote on the use of their "support money" by the Union. They would not be entitled as a matter of right to receive the Union's publication "Solidarity," nor would these support money employees have any guarantee that their payments would entitle them to strike benefits and participation in the Union's Educational Fund, or to any of the other economic benefits

guaranteed union members, since, as Mr. Woodcock pointed out, "our constitution isn't written in terms of non-members." I find this evidence to demonstrate conclusively that not only are the support money employees excluded from the social benefits and activities of the Union but they are likewise not permitted a voice, or any form of participation, apart from their contribution of support money, in formulation of policies, decisions; or any other of the Union's activities relating to their economic interests as employees or to the Union's representation of these interests vis-a-vis their employer.

When Congress enacted the original Wagner Act it provided, among other things, that a labor organization when selected by a majority of the employees in an appropriate unit to act as their representative for collective bargain- [fol. 39] ing purposes should become the exclusive agent of both the majority who voted for the selection of such an agent as well as of the dissenting minority who voted against such selection. The concept thus created is wholly statutory in origin.[30] It is also settled that except for the Act, employers are not under compulsion of law bound to baragin collectively.[31] In speaking of the nature of the duties imposed upon such bargaining agent, the Supreme Court in *Wallace v. N.L.R.B.*, 323 U. S. 248, 255, held that:

> *The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interest of its own group members.* By its selection as bargaining representative, it has become the agent of all the employees charged with the responsibility of representing their interests fairly and impartially. (Emphasis supplied.)

In enacting the proviso to Section 8(a)(3), Congress effected a compromise between allowing a total closed-shop situation and no compulsory unionism at all by delimiting the area within which a union acting as the exclusive bar-

[30] See *Virginian Company v. System Federation No. 40*, 300 U. S. 515, 544-549; *N. L. R. B. v. Jones and Laughlin Steel Corp.*, 301 U. S. 44-45.

[31] *N. L. R. B. v. Jones and Laughlin Steel Corp., supra; National Maritime Union* v. *Herzog*, 78 F. Supp. 146, 155.

gaining agent could bargain with respect to compulsory union adherence.

The proviso to Section 8(a)(3) was enacted to answer the argument that employees who enjoyed the benefits of collective bargaining without paying their proportionate share of the cost of representation were "free riders."[32] It follows therefrom that when such nonconsenting employees do pay their proportionate share of the cost of representation particularly where, as under the proviso, the failure to so tender their dues and initiation fees places their job [fol. 40] security in jeopardy when requested by the union, they should be allowed at least an economic voice in the functioning of the exclusive bargaining agent in its representation of them before the employer, and in its carrying out the statutory function of collective bargaining.

That employee participation in the functioning of the exclusive bargaining agent is clearly contemplated by the Congress is shown by the very definition of terms in the Act itself. Thus—

> The term "representatives" includes any individual or labor organization. (Sec. 4)

and further—

> The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, *in which employees participate* and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (Sec. 5) (Emphasis supplied.)

It is thus clear that if, as in the instant case, those who would pay an equal fee for the Union to carry out its function as the exclusive bargaining agent, are denied equal rights to participate in and benefit from the bargaining process, they would have a second-class status, and thus

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[32] Senate Report No. 105 of the Committee on Labor and Public Welfare to accompany S. 1126, 80th Congress, 1st Session.

would be deprived of a fundamental right guaranteed in the Act.

For these additional reasons I conclude that a demand to negotiate such an agreement is an unlawful demand not contemplated by the Act as a mandatory subject of collective bargaining.

I therefore join Chairman Leedom and Member Jenkins in dismissing the complaint herein in is entirety.

Dated, Washington, D. C.

Arthur A. Kimball, Member National Labor Relations Board

[fol. 41] PHILIP RAY RODGERS and JOHN H. FANNING, Members, dissenting:

This case comes to the Board upon a complaint alleging that the Respondent Company violated Section 8(a)(1) and (5) by refusing to bargain with the Union concerning a proposed contractual provision, commonly referred to as an "agency shop" or "support money" clause.[33] The proposed clause would require, as a condition of employment, that all non-Union-member employees of Respondent working in the State of Indiana pay to the Union, 30 days after the date of their initial employment or the execution of the clause, a sum of money equivalent to the regular Union dues and fees. In dismissing the complaint, our colleagues have determinned that the proposed agency shop provision, if adopted, would violate the Act. We disagree.[34]

To reach the ultimate issue, i.e., whether Respondent violated Section 8(a)(5), the Board must first determine

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[33] See *Public Service Company of Colorado*, 89 NLRB 418, 422 at n. 17; *American Seating Co.*, 98 NLRB 800, 802.

[34] The collective position of our colleagues presents us with 3 separate and disparate opinions, and indeed, we think, within each opinion different and inherently conflicting rationales. We believe, therefore, it will better serve the purpose of clarity to address ourselves in the main to a positive exposition of our findings on the legal issue, and limit our comments on the varied theories and authorities of the majority.

whether *any* agency shop provision could be considered as lawful under the Act.[35] This determination would be dispositive of the case since if any such agreement is lawful [fol. 42] it concededly would fall into the category of mandatory subjects as to which the Respondent could be compelled to bargain.

Before approaching the problem of the legality of an agency shop agreement, two factors merit emphasis as they are both indispensable to a proper solution of the problem posed.

First, all parties to this proceeding are in agreement that the Board is to decide this case under the Federal Act, applying Federal law, and without resorting to the law of any State. No party has proceeded on the ground that the proposed agency shop agreement would violate Indiana's "right-to-work" law.[36] And Respondent predicated its re-

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[35] The issue of the propriety of an agency shop as a subject of bargaining has come to the Board upon a stipulated record. In our opinion, the Board's primary obligation is to decide this specific case involving a specific set of facts and based on the specific arguments which counsel has directed to our attention. Among other things, we cannot conclude on this stipulated record that a bargaining impasse ensued from Respondent's refusal to negotiate on the proposed agency shop; nor do we find that Respondent's good faith belief that an agency shop is unlawful under the Federal Act would constitute a defense if in fact it is not unlawful.

[36] In the recent case of *Meade Electric Co. v. Hagberg*, 159 N. E. 2d 408, 44 LRRM 2312 (1959), the Indiana Appellate Court construed the Indiana "right-to-work" statute as not prohibiting an "agency shop" provision substantially similar to the clause proposed by the Union in the instant proceeding. It is significant to note that the Indiana statute is couched in terms of "membership" and "nonmembership" and, like the Federal Act (Section 7), grants to employees the right to assist or refrain from assisting a labor organization. And see, e. g., *Schernerhorn v. Local 1625, Retail Clerks*, 47 LRRM 2300 (Dec. 23, 1960), where a Florida court handed down a similar ruling under the Florida "right-to-work" law.

fusal to bargain with the Union on the belief that the proposed agency shop clause was unlawful without reference to Indiana law.[37] Consequently, the Board is not required to treat the question in issue as involving anything other than the Federal Act, without reference to the limitation set forth in Section 14(b). Thus neither Section 14(b) relating to the withdrawal of the Federal Act where State law prohibits the "execution or application of agreements requiring membership in a labor organization as a condi-[fol. 43] tion of employment", nor in particular the "right-to-work" statute of Indiana or any other State need be reached in this case.[38]

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[37] In its reply brief, the Respondent stated:

> No one, much less the Respondent, is here contending that an "agency shop" arrangement such as has been proposed by the UAW is illegal under Indiana law. The legality of "agency shop" agreements under Indiana law is not in dispute in this proceeding.

[38] Notwithstanding that on the stipulated record the source of the governing law is to be Federal in nature, Chairman Leedom (whose rationale Member Kimball apparently adopts) has proceeded to construe State law.

Thus, for example, he attempts to distinguish the *Public Service* and *American Seating* cases on the ground that "no legal impediment existed to preclude the parties from entering into a contract requiring all employees to be union members." The "legal impediment" to which he impliedly alludes as existing in the instant case is the Indiana "right-to-work" law. The Chairman flatly states that the proposed agency shop is unlawful in Indiana, despite the judicial holding in Indiana to the contrary. In effect he would automatically forbid the agency shop, and we suppose all forms of union security, in any "right-to-work" jurisdiction purely on the basis of that label,—implying that the "right-to-work" laws in all States must be regarded as identical and that not even the State will be allowed to say otherwise.

Unlike our colleagues, we do not think it is the Board's province to undermine a State court decision interpreting a State statute. Especially is this so in this case where the Indiana Appellate Court has already rendered a formal

Second, there is no suggestion made anywhere in this proceeding that membership in the Union is not available to any non-member employee who wishes to join.[39] Everyone concedes that the Union was not seeking to bargain over a clause requiring non-member employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed union policy with respect to applicants for membership.[40] Accordingly, the question of the legality of an agency shop provision must be viewed as contemplating an arrangement in which, while [fol. 44] employment is conditioned upon payment of the equivalent of dues and fees, all employees are *given the option* of becoming, or refraining from becoming, members of the Union.[41]

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decision as to the construction of the Indiana statute. *Algoma Plywood & Veneer Co. v. W. E. R. B.*, 336 U. S. 301, 307-14 (1948).

[39] The record and briefs in the case affirmatively indicate the availability of membership to the Indiana employees. In their bargaining with respect to the agency shop proposal, the parties could, of course, agree to insert in a contract that membership would be available but not required.

[40] Since the question of the extent to which a closed union policy might affect the legality of an agency shop agreement is not an issue in this case, we find it unnecessary to reach that question.

[41] We note that all our colleagues, and Member Kimball in particular, have placed great stress upon the testimony of Woodcock, the Union's vice-president, which they construe as evidence of the fact that non-member employees, who would be required to pay the equivalent of union dues and fees, would be deprived of certain benefits which members would acquire solely by virtue of their membership and as a matter of right. As reflected in the record, every question asked of Woodcock was with reference to the Union's *constitution* (and not with respect to the Union's agency-shop proposal). Woodcock responded that there were no provisions in the *constitution* which expressly set forth the rights of *non-members* to participate in *union* meetings, in *union* strike funds, to receive the *union* magazine, etc. But Woodcock also testified repeatedly that

In light of both these factors, there is no doubt in our mind that an agency shop agreement is a permissible form of union-security within the meaning of Sections 7 and

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despite the absence of express provisions dealing with *non-union* members' rights in the Union's constitution, the custom and practice of the Union, as deemed by it to be consistent with the constitution, is to grant all the rights accorded to members to non-members as well, if the non-members pay sums equal to dues and fees. Thus, Woodcock testified that the benfits afforded to members by the constitution are denied to those employees who "are non-members in the sense of non-paying to any extent." But, to those who pay the equivalent of dues and fees, they are *placed on the Union's rolls* and "they are entitled to the same benefits as a member unless they themselves choose not to make them available to them."

It is the statutory duty of the exclusive bargaining agent to represent equally all employees in the unit, union members and non-members alike. *Hughes Tool Co.*, 104 NLRB 318. There can be no dispute that the duty is legally fulfilled, for example, where under a concededly valid union shop or maintenance of membership contract employees refrain from joining the union and are denied the intra-union organizational benefits afforded to members. Nor in the maintenance of membership situation would the fact that non-members are not required to pay dues detract from the nondiscrimination and equal treatment to which they are entitled under the Act. The statute sanctions the enforceable collection of dues and fees from *members* pursuant to a valid union security contract plainly because Congress has vested in the majority union the *obligation* of statutory bargaining representative, and not on account of the internal organizational benefits, e. g., fraternal, which the members receive. Nonmembers in the unit must be accorded the same representation service, pertaining to wages, hours and work conditions with the employer, and the statutory sanction for financial support of such service derives from the same source. This is reinforced by the Congresssional purpose, as conceded, of eliminating "free riders." The amount of the charges to the non-members is justified on the basis of a reasonable general classification. *The Electric Auto Lite Co.*, 92 NLRB 1073, 1077.

8(a)(3) of the Act. We are impelled by what we believe is the clear intention of the Congress as expressed in Section 8(a)(3) of the Act, in the legislative history of the [fol. 45] Wagner [42] and Taft-Hartley [43] Acts, and by the Board and court decisions in which that Section has been construed. Our colleagues, on the other hand, by apparently holding, *inter alia*, that an agency shop is permitted only as an alternative to, or waiver of a valid union shop or

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[42] E. g., "The Bill does nothing to facilitate closed shop agreements or to make them legal in any State where they may be illegal. It does not interfere with the *status quo* on this debatable subject but *leaves the way open to such agreements as might now be legally consummated.* • • •." (Emphasis added.) S. Rep. No. 573, 74th Cong., 1st Sess., p. 11. That various forms and degrees of union security contracts were then extant and permitted in many States was well known to Congress and, in particular, to the Board in its consideration of the *Public Service* case.

[43] E. g., Senator Taft in explaining the Section 8(a)(3) provisos: "• • • while I think of it, I should like to say that *the rule adopted by the [Conference] committee is substantially the rule now in effect in Canada.* Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the present rule in Canada is that there can be a closed shop or union shop, and the union does not have to admit an employee who applied for membership, but the employee must nevertheless, pay dues, even though he does not join the union. *If he pays the dues without joining the union, he has the right to be employed.*" • • • (Emphasis added.) 93 Cong. Rec. 5088, May 9, 1947. While, not controlling of the legal issue, we note that, in a recent Bureau of National Affairs survey of 400 representative contracts, *6 percent contained agency shop clauses.* 46 LRR 458, October 17, 1960; that, as appeared in the oral argument herein, in the 10 years since *Public Service* was decided the General Counsel has been dismissing charges alleging agency shop contracts as unlawful, and contracts have been written involving large numbers of employees in reliance upon the Board's holdings.

[fol. 46] maintenance of membership provision,[44] have taken a novel approach which not only ignores the clear legislative history and indeed the terms of the Act itself, but which also runs completely contrary to well-established precedent.[45]

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[44] We are assuming this much because of statements made to such effect in the majority opinions, although elements of the rationale in each of the various opinions appear to us to cast doubt on the validity of the agency shop under any circumstances. In the majority opinions, and particularly in Chairman Leedom's concurrence, the argument is made that under the Federal Act the only permissible type of union security agreement is one which conditions employment upon union "membership." Thus, the majority reasons, where "membership" can be required, there is nothing under the Federal Act precluding the parties from negotiating away a "membership" requirement and imposing in lieu thereof some lesser form of union security (as, for example, an agency shop).

The fallaciousness of this position is self evident. For obviously, if the provisos to Section 8(a)(3) only permit agreements requiring "membership", then by a parity of reasoning all agreements requiring less than "membership", whether or not they are rationalized as a "waiver" or "alternative" to a permissible membership requirement, would have to be considered unlawful. If parties can waive where they are allowed a "membership" requirement, logically they can accomplish the same result absent such allowance so far as the discrimination and interference provisions of the Act are concerned. It is inconceivable to us that Congress had such an unrealistic and meaningless purpose as advanced by our colleagues.

[45] Member Jenkins' opinion concludes that an agency shop agreement is unlawful because it "can have no other foreseeable consequence than tending to encourage membership in UAW or discourage membership in any other union." Chairman Leedom and, presumably, Member Kimball are in agreement with this conclusion. Of course all forms of union security, including the agency shop, naturally have such tendency or effect. But if the agency shop is within

The basic problem, simply stated, is whether this form of union security, the agency shop, is, and was intended by Congress to be, embraced within the Section 8(a)(3) proviso. The question is clearly answered in the precedents, e.g., *Public Service*, *American Seating*, *Union Starch*, and *Radio Officers*.

The unanimous Board in *Public Service*, after oral argument, rendered a careful and comprehensive opinion on all [fol. 47] pertinent aspects—including the legislative history and technical questions of statutory construction—of essentially the same problem under the Wagner Act.[46] The Board ruled that the Section 8(a)(3) proviso, which specifically allows a "membership" requirement in a contract, was intended to be "permissive and not exclusive in character;" that it merely sets the *maximum* limits of union security which may be negotiated; and that the *lesser* forms of union security, e. g., an agency shop, were clearly permitted. We believe the case is manifestly sound. During the Taft-Hartley period, the Board in *American Seating* expressly reaffirmed the holding in *Public Service*, stating:

> "As the precise language of the 8(3) proviso in the Wagner Act was continued in the amended Act * * *, and because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining *support payments from nonunion members who would otherwise be 'free riders,'* we find that the provision for support payments in the instant contract does not exceed the union-security agreements authorized by the Act." 98 NLRB 800, 802 (1952). (Emphasis added.)

Indeed, on the bare face of it, it would seem wholly unreasonable that Congress would require that the union obtain a concession from the employer only in the *maxi-*

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the exemption of the Section 8(a)(3) proviso, as we believe it clearly is, this conclusion of our colleagues is a non sequitur.

[46] The case was decided after Taft-Hartley became effective with full knowledge by the Board of the provisions and policy of the later statute.

mum degrees of union security.[47] Our colleagues seek to [fol. 48] distinguish, limit, and in effect overrule these cases on narrow and reaching grounds.[48] But the *bases of decision* in these cases are unmistakably stated therein and directly affect and control the legal issue here involved.[49]

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[47] In the provisos to both Sections 8(3) of the Wagner Act and 8(a)(3) of the Taft-Hartley Act, the public policy is stated: "That nothing in this Act, *or in any other statute of the United States*, shall preclude an employer from making [such] an agreement * * *." (Emphasis added.) See *Algoma Plywood & Veneer Co. v. W. E. R. B.*, 336 U. S. 301. In making this statement of policy, did Congress intend to place upon the described *form* of union security provision as to which it was thus proclaiming immunity from all its laws, a technical restriction, to-wit, that it *must* contain a "membership" requirement?

[48] For example, Member Jenkins first sets forth the issues which are *not* involved in this proceeding, then he proceeds to dissect the statute by reading Section 8(a)(3) "without reference to any proviso," and finally he attempts to sweep away the previously referred to cases on the grounds of irrelevancy. It is of course fundamental statutory construction that effect must be given to all provisions of a statute. In particular, Section 8(a)(3) cannot be read except in its entirety, with the provisos being an inextricable part as they serve to define and clarify the purport of the whole section. As will be further shown, these precedents are quite relevant and should not be lightly treated where to do so would overturn basic and soundly considered principles as to the meaning of pertinent statutory provisions, including Section 8(a)(3) *and its provisos*. See also the Chairman's basis for distinguishing *American Seating* and *Public Service*, *supra*, note 38.

[49] An interesting fact to be noted in the *Public Service* case (at p. 419) is that after executing the "support money" clause, the employer sent a letter to the employees in which it explained that, while it would not agree to the union's proposal for a union shop because "there were employees who for their own personal reasons would not care to join the Union," the employer agreed to the alternative agency shop clause to promote more harmony among the employees.

As is quite evident, the majority is in error in ignoring the *Union Starch* and *Radio Officers* cases or brushing them aside as irrelevant.

The *Union Starch* construction of Section 8(a)(3)[50] has been an accepted and settled rule in many Board and court [fol. 49] cases. In those cases, even where "membership" is specifically required in a valid union security contract, for all practical purposes the union cannot enforce the actual membership requirement but can obtain at most the periodic dues and initiation fees. Thus, a contract, such as the agency shop, which requires only that which the union under the Act can realistically and effectively enforce, must in all reason and equity be held lawful. (An agency shop does not require literal membership; *nor does a union shop.*) Otherwise, if the majority view is taken, the union should be permitted to enforce a union shop requirement for literal membership, regardless of the nature of the union, its constitution and by laws, and the particular application of the Section 8(b)(1)(A) proviso.[51] Surely, our colleagues are aware that to enforce such literal membership would run counter to the fundamental precepts and

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[50] In *Union Starch & Refining Company*, 87 NLRB 779, enf'd 186 F. 2d 1008 (7th Cir. 1951), cert. denied 342 U. S. 815 (and cited approvingly by the Supreme Court in *Radio Officers'*) the Board said: "We therefore read proviso (B) as extending protecton to any employee who tenders periodic dues and initiation fees without being accorded membership. If the union imposes any other qualifications and conditions for membership with which he is unwilling to comply, such an employee may not be entitled to membership, but he is entitled to keep his job". (At p. 784.) And see 87 NLRB at 781, note 8, where the Board said: "The provisos of Section 8 (a) (3) are specifically limited to protecting *nonmembers* of the contracting union, and cannot be converted into statements of the conditions which entitle an employee to membership rather than those which entitle him, as a nonmember, to keep his job."

[51] Which provides that the guarantee of employee rights in Section 7 "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

philosophy of Taft-Hartley in protecting the rights and freedom of choice of employees *vis a vis* union membership.

In the *Radio Officers'* case,[52] the Supreme Court recognized:

> Lengthy legislative debate preceded the 1947 amendments to the Act which thus limited permissible employer discrimination. *This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about 'free riders,'* i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and *gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.* (Emphasis added.)

[fol. 50] In consequence of the foregoing, the Court concluded that Congress intended to accord to employees the right "to join unions, be good, bad, or indifferent members, or *abstain from joining any union without imperiling their livelihood.*"

Certainly the Supreme Court clarified that which Congress sought to permit in the area of union security and that which it sought to limit. While Section 8(a)(3) is couched in terms of "membership", the Court noted that the term had been "too restrictively interpreted" (by the Eighth Circuit). The Court provided a construction of that term, and the whole Section in keeping with the basic policy of the amended Act, namely, "*to insulate employees' jobs from their organizational rights*".[53] By such a reading, the Court gave effect to the main thrust of the entire Section, which is to protect employees in their hire or tenure of employment; and this was accomplished by equating the word "membership" with the status or right to be protected from being discharged—a status which could not be inter-

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[52] *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 40-41 (1954).

[53] 347 U. S. at 40.

fered with so long as the employee tendered the requisite periodic dues and fees. Conversely, "non-membership" was equated to a status which resulted only from a failure to tender such dues and fees, and which rendered the delinquent "non-member" employee subject to being discharged.[54]

In view of the foregoing, we are unable to see how our colleagues can distinguish the instant agency shop proposal from any other union security proposal which predicates a right of discharge *only* upon an employee's failure to tender the equivalent of regular union dues and initiation fees. The Union sought to bargain concerning a clause which would leave the final decision as to membership or non-membership with each individual employee, *at his option*, [fol. 51] but nevertheless, to condition employment upon the payment of sums of money which would constitute each employee's "share of financial support". In our opinion, such a proposal fully comports with the Congressional intention in Section 8(a)(3) for the allowance of unions security contracts, and, therefore, is a mandatory subject as to which the Respondent is obliged to bargain.

Consequently, we would find that the Respondent violated Section 8(a) (1) and (5) of the Act, as alleged.[55]

Dated, Washington, D. C.

Philip Ray Rodgers, Member, John H. Fanning, Member National Labor Relations Board

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[54] As stated by Senator Taft, "*In other words, what we do, in effect, is to say that no one can get a free ride in such a shop* • • • The employee has to *pay the union dues.*" (Emphasis added.) 93 Cong. Rec. 3953, April 23, 1947.

[55] It is beyond the Board's authority to tell the parties what specific result they should reach in bargaining. *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395 (1952). Accordingly, by concluding that the proposed agency shop agreement is a lawful and mandatory subject for bargaining, we would not impose a duty upon the Respondent to execute such an agency shop clause, or any other clause; the duty imposed would go no further than to direct the Respondent, upon request, to bargain in good faith.

[fol. 52] BEFORE THE NATIONAL LABOR RELATIONS BOARD

133 NLRB No. 21 D-2305 Indiana

Case No. 7-CA-2560

GENERAL MOTORS CORPORATION AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO

SUPPLEMENTAL DECISION AND ORDER OF NATIONAL LABOR RELATIONS BOARD—September 29, 1961

On February 20, 1961, the National Labor Relations Board (Members Rodgers and Fanning dissenting) issued a Decision and Order in the above-entitled case (130 NLRB No. 54), dismissing the entire complaint, as amended, which alleged, in substance, that the Respondent, herein called GM, refused to bargain with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, herein called UAW, concerning terms of an agreement supplementary to an existing agreement between the parties. Thereafter, the General Counsel and the UAW, the charging party, filed motions for reconsideration and briefs in support. Briefs in support of the motions were also filed by the Retail Clerks International Association, AFL-CIO; the AFL-CIO; Commercial Telegraphers' Union, AFL-CIO; United Steel Workers of America, AFL-CIO; and Indiana State Building and Construction Trades Council. UAW, Commercial Telegraphers' Union, and Indiana State Building and Construction Trades Council also requested oral argument in connection with the motions for reconsideration. GM and [fol. 53] the Intervenor[1] filed briefs in opposition to the motions. As the record, including the exceptions and briefs, adequately present the issues and positions of the parties, the requests for oral argument in connection with the motions for reconsideration are hereby denied. We hereby

[1] The Intervenor is a group of GM employees in the appropriate unit who are opposed to the UAW's proposed supplemental agreement.

grant the motions for reconsideration and vacate our previous Decision and Order in this case, except for the formal parts consisting of the procedural aspects of the case, and the findings as to the business of the Respondent and as to the labor organization involved.

The Refusal to Bargain

By letter of October 20, 1959, UAW requested GM to bargain concerning a proposed supplementary agreement to their existing national agreement [2] under which the nonmember employees represented by UAW in GM's nine plants in six Indiana cities (Anderson, Bedford, Kokomo, Indianapolis, Marion and Muncie) [3] and new employees hired thereafter would be required as a condition of continued employment after 30 days following the date of such [fol. 54] supplementary agreement or of their initial employment (whichever is later) to pay to the UAW a sum equal to the initiation fee charged by each of its local unions involved and a monthly sum equal to the regular dues required of union members at each location.

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[2] The national agreement, dated October 2, 1958, and effective until August 31, 1961, and thereafter from year to year, provides for maintenance of membership and a union shop, except as follows:

> "(4b) Anything herein to the contrary notwithstanding, an employee shall not be required to become a member of, or continue membership in, the union, as a condition of employment, if employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment."

[3] The UAW's letter referred to "five" Indiana plants. However, it appears from the record that the plants involved in this proceeding are the Chevrolet Motor Division and the Allison Division in Indianapolis, the Delco Radio Division in Kokomo, the Fabricast Division in Bedford, the Battery Operations and the Delco-Remy Division in Muncie, the Delco-Remy Division and the Guide Lamp Division in Anderson, and the Fisher Body Division in Marion.

By letter, dated October 27, 1959, GM answered, stating that, as an "agency shop arrangement * * * as * * * detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request * * *"

The foregoing exchange of correspondence took place after a decision on June 19, 1959, by the Indiana Appellate Court, holding that an agency shop under which nonunion members are required, as a condition of employment, to pay the exclusive bargaining agent a fee, in the equivalent of dues, initiation fees and assessments paid by union members, was a legal union-security arrangement in the State of Indiana notwithstanding Indiana's Right-to-Work Law.[4] The court reasoned that Indiana's Right-to-Work Law, unlike right-to-work statutes of other jurisdictions which spe-
[fol. 55] cifically prohibit or restrict agency-shop arrange-

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[4] The Right-to-Work Law of the State of Indiana, the place of employment of the employees involved herein, provides in pertinent part (Burn's Ind. Statutes, Ann. Sec. 40-2703 C. P. S., Acts of 1957, Ch. 19, Sec. 3):

> No corporation or individual or association or labor organization shall solicit, enter into or extend any contract, agreement or understanding written or oral, to exclude from employment any person by reason of membership or nonmembership in a labor organization, to discharge or suspend from employment or layoff any person by reason of his refusal to join a labor organization * * * Any such contract, agreement, or understanding, written or oral, entered into or extended after the effective date of this Act, shall be null and void and of no force or effect. * * *

Section 14 (b) of the National Labor Relations Act provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

ments, only forbids arrangements requiring union membership, and, as an agency-shop does not require union membership, the Indiana statute did not apply to an agency-shop arrangement.[5]

Apart from the issue concerning the legality of the agency-shop arrangement, all facts necessary for proof of a Section 8(a) (5) violation are either stipulated or conceded. The Respondent admits that the UAW has been and now is the exclusive collective bargaining representative for all production and maintenance employees and mechanical employees in engineering department shops in the plants or facilities of the Respondent covered by the national agreement between the UAW and GM, dated October 2, 1958, including employees at the Respondent's aforementioned Indiana plant locations, and that the UAW services the employees whom it represents at each of these plants through its local unions. The parties stipulated that, for the purposes of this case, they do not "intend to raise or rely" upon a provision in the national agreement which purports in broad terms to preclude any requirement of further bargaining during the term of the agreement. The parties are in agreement that, if UAW's proposal is lawful, the subject matter of the proposal constituted a mandatory subject for collective bargaining and that GM's refusal to bargain with respect to it would violate Section 8(a) (5); but that, if UAW's proposal is unlawful, GM had no legal obligation to bargain as to it.

Thus, the ultimate issue to be determined is whether UAW's proposal for an agency-shop arrangement to cover GM employees employed in the State of Indiana is a lawful proposal under the National Labor Relations Act, as amended.

[fol. 56] GM contends that UAW's proposed agency-shop clause is illegal under the provisions of Section 7, Section 8(a) (1), and Section 8(a) (3).[6] More specifically, GM con-

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[5] *Meade Electric Company v. Hagberg*, 159 N. E. 2d 408 (1959), 44 LRRM 2312. Cf. *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, 463.

[6] Section 7 of the Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

tends that the exercise of rights of employees under Section 7 of the Act, as amended in 1947, and particularly the right

> collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

Sections 8(a) (1) and 8(a) (3), in relevant part, provide that: it shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; • • •
>
> (3) by discrimination in rgard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made • • • Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; • • •

to refrain from assisting a labor organization, is limited only by agreements requiring union membership as authorized in Section 8(a) (3). GM asserts that, because an agency-shop requires non-union employees to contribute financial support to a labor organization and because, for the reasons hereinafter set forth, an agency-shop arrangement does not meet the requirements of Section 8(a) (3), an agency-shop arrangement, if adopted, would interfere with the exercise of rights guaranteed in Section 7, and would therefore constitute a violation of Section 8(a) (1).

GM further contends that the first proviso to Section 8(a) (3) spells out the only type of agreement, i.e., an agreement limited to conditioning continued employment upon membership in a labor organization, that may permissibly infringe upon rights guaranteed in Section 7 and not ex-
[fol. 57] pose an employer to a violation of Section 8(a) (3). GM asserts that the first proviso to Section 8(a) (3) makes clear that to condition employment on anything other than membership in a labor organization is contrary to the statute. Finally, GM contends that, as UAW's proposal fails to meet the requirements of the first proviso to Section 8(a) (3), its proposal would afford GM no protection from the sweep of the basic no-discrimination provision of Section 8(a) (3) were it to enforce an agency-shop agreement against employees who refuse to pay support money, and thus the proposal is illegal.

On the other hand, the General Counsel and the UAW contend in substance that the first proviso to Section 8(a) (3) merely defines the outer limits of permissible union-security provisions and that the proviso encompasses within its scope lesser forms of union-security arrangements, including the agency shop which requires only the payment of the equivalent of dues and initiation fees but does not compel membership in a labor organization.

Before approaching the problem of the legality of an agency shop agreement, two factors merit emphasis as they are both indispensable to a proper solution of the problem posed.

[fol. 58] First, all parties to the proceeding are in agreement that the Board decide this case under the Federal Act, applying Federal law, and without resorting to the law of any State. No party has proceeded on the ground that

the proposed agency shop agreement would violate Indiana's "right-to-work" law.[7] And the Respondent predicated its refusal to bargain with the Union on the belief that the proposed agency shop clause was unlawful without reference to Indiana law.[8] Thus, as the issue is framed by the parties, neither Section 14(b), relating to the withdrawal of the Federal Act where State law prohibits the "execution or application of agreements requiring membership in a labor organization as a condition of employment," nor in particular the "right-to-work" statute of Indiana or any other State need be reached in this case.[9]

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[7] In *Meade Electric Co. v. Hagberg, supra*, the Indiana Appellate Court construed the Indiana "right-to-work" statute as not prohibiting an "agency shop" provision substantially similar to the clause proposed by the Union in the instant proceeding. It is significant to note that the Indiana statute is couched in terms of "membership" and "nonmembership" and, like the Federal Act (Section 7), grants to employees the right to assist or refrain from assisting a labor organization. And see, e. g., *Schernerhorn v. Local 1625, Retail Clerks*, 47 LRRM 2300 (Dec. 23, 1960), where a Florida court handed down a similar ruling under the Florida "right-to-work" law.

[8] In its reply brief, the Respondent stated:

> No one, much less the Respondent, is here contending that an "agency shop" arrangement such as has been proposed by the UAW is illegal under Indiana law. The legality of "agency shop" agreements under Indiana law is not in dispute in this proceeding.

[9] Notwithstanding that on the stipulated record the source of the governing law is to be Federal in nature, our dissenting colleague has proceeded to construe State law. Thus, for example, he attempts to distinguish the *Public Service* and *American Seating* cases, cited *infra*, on the ground that in those cases "no legal impediment existed to preclude the parties from entering into a contract requiring all employees to be union members." The "legal impediment" to which he impliedly alludes as existing in the instant case is the Indiana "right-to-work" law. He states that the proposed agency shop is unlawful in In-

[fol. 59] Second, there is no suggestion made anywhere in this proceeding that membership in the Union is not available to any nonmember employee who wishes to join.[10] Everyone concedes that the Union was not seeking to bargain over a clause requiring nonmember employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed-union policy with respect to applicants for membership.[11] Accordingly, the question of the legality of an agency-shop provision here must be viewed as contemplating an arrangement in which, while employment is conditioned upon payment of the

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diana, despite the judicial holding in Indiana to the contrary. In effect, he would automatically forbid the agency shop, and we suppose all forms of union security, in any "right-to-work" jurisdiction purely on the basis of that label,—implying that the "right-to-work" laws in all States must be regarded as identical and that not even the State will be allowed to say otherwise. We do not think it is the Board's province to undermine a State court decision interpreting a State statute, such as in this case where the Indiana Appellate Court has already rendered a formal decision as to the construction of the Indiana statute. *Algoma Plywood & Veneer Co. v. W. E. R. B.*, 336 U. S. 301, 307-14 (1948).

[10] The record and briefs in the case affirmatively indicate the availability of membership to the Indiana employees. Indeed Section 4(c) of the existing national agreement requires the Union "to accept into membership each employee covered by this agreement who renders to the Union the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership in the Union." The Union's agency shop proposal specifically provided that Indiana employees would have an opportunity to become union members. In their bargaining with respect to the agency shop proposal, the parties could, of course, agree to insert in a contract that membership would be available but not required.

[11] Since the question of the extent to which a closed-union policy might affect the legality of an agency-shop agreement is not an issue in this case, we find it unnecessary to reach that question.

[fol. 60] equivalent of dues and fees, all employees are *given the option* of becoming, or refraining from becoming, members of the Union.[12]

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[12] There is no basis for the position, derived from testimony of Woodcock, the Union's vice-president, that nonmember employees, who would be required to pay the equivalent of union dues and fees, would be deprived of certain benefits which members would acquire solely by virtue of their membership and as a matter of right. As reflected in the record, every question asked of Woodcock was with reference to the Union's *constitution* (and not with respect to the Union's agency-shop proposal). Woodcock responded that there were no provisions in the constitution which expressly set forth the rights of nonmembers to participate in *union* meetings, in *union* strike funds, to receive the *union* magazine, etc. But Woodcock also testified repeatedly that, despite the absence of express provisions dealing with *nonunion* members' rights in the Union's constitution, the custom and practice of the Union, as deemed by it to be consistent with the constitution, is to grant all the rights accorded to members to nonmembers as well, if the nonmembers pay sums equal to dues and fees. Thus, Woodcock testified that the benefits afforded to members by the constitution are denied to those employees who "are nonmembers in the sense of nonpaying to any extent." But, to those who pay the equivalent of dues and fees, they are *placed on the Union's rolls* and "they are entitled to the same benefits as a member unless they themselves choose not to make them available to them."

It is the statutory duty of the exclusive bargaining agent to represent equally all employees in the unit, union members and nonmembers alike. *Steele v. Louisville & N. R. Co.*, 323 U. S. 192; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U. S. 210; *Hughes Tool Co.*, 104 NLRB 318. There can be no dispute that the duty is legally fulfilled, for example, where under a concededly valid maintenance of membership contract employees refrain from joining the union and are denied the intra-union organizational benefits afforded to members. Nor in the maintenance of membership situation would the fact that non-members are no required to pay dues detract from the nondiscrimination and

[6] In the light of both these factors, we have no d bt that an agency-shop agreement is a permissible form n security within the meaning of Sections 7 and (3) of the Act. We are impelled by what we believe clear intention of the Congress as expressed in Section (3) of the Act, in the legislative history of the Wag- and Taft-Hartley [14] Acts, and by the Board and court de ons in which that Section has been construed.

he sic problem, simply stated, is whether this form

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al treatment to which they are entitled under the Act. statute sanctions the enforceable collection of dues and rom *members* pursuant to a valid union-security con- because Congress has vested in the majority union obligation of statutory bargaining representative, and on account of the internal organizational benefits, e. g., rnal, which the members receive. Non-members in it must be accorded the same representation service pertaining to wages, hours and work conditions with the oyer, and the statutory sanction for financial support uch service derives from the same source. This is nforced by the Congressional purpose, as conceded, of minating "free riders." The amount of the charges to non-members is justified on the basis of a reasonable neral classification. *The Electric Auto Lite Co.*, 92 NLRB 1077, enf'd 196 F. 2d 500 (C. A. 6), cert. denied 344 U. S. 823.

[13] E.g., "The Bill does nothing to facilitate closed shop agreements or to make them legal in any State where they may be illegal. It does not interfere with the status quo on this debatable subject but *leaves the way open to such agreements as might now be legally consummated* • • •." (Emphasis added.) S. Rep. No. 573, 74th Cong., 1st Sess., p. 11. That various forms and degrees of union-security contracts were then extant and permitted in many States was well known to Congress and, in particular, to the Board in its consideration of the *Public Service* case, *infra*.

[14] E. g., Senator Taft, in explaining the Section 8(a) (3) provisos: "• • • while I think of it, I should like to say *the rule adopted by the* [Conference] committee is substantially the rule now in effect in Canada. Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the present rule in Canada is that there can be a closed shop or union shop, and the union does not have

of union-security, the agency-shop, is, and was intended by Congress to be, embraced within the Section 8(a) (3) proviso. The question is answered in the precedents, e.g., *Pub-*
[fol. 62] *lic Service*,[13] *American Seating*,[16] *Union Starch*,[17] and *Radio Officers*.[18]

The unanimous Board in *Public Service*, rendered a comprehensive opinion on all pertinent aspects, including the legislative history and technical questions of statutory construction, of essentially the same problem under the Wagner Act.[19] The Board ruled that the Section 8(3) proviso, which specifically allows a "membership" requirement in

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to admit an employee who applied for membership, but the employee must nevertheless, pay dues, even though he does not join the union. *If he pays the dues without joining the union, he has the right to be employed.*" * * * (Emphasis added.) 93 Cong. Rec. 5088, May 9, 1947. While not controlling of the legal issue, we note that, in a recent Bureau of National Affairs survey of 400 representative contracts, *6 percent contained agency-shop clauses*, (46 LRR 458, October 17, 1960); that, as appeared in the oral argument herein, in the 10 years since *Public Service* was decided the General Counsel has been dismissing charges alleging agency-shop contracts as unlawful, and that contracts have been written involving large numbers of employees in reliance upon the Board's holdings.

[15] *Public Service of Colorado*, 89 NLRB 418 (1950). An interesting fact to be noted in the *Public Service* case (at p. 419) is that after executing the "support money" clause, the employer sent a letter to the employees in which it explained that, while it would not agree to the union's proposal for a union shop because "there were employees who for their own personal reasons would not care to join the Union," the employer agreed to the alternative agency-shop clause to promote more harmony among the employees.

[16] *American Seating Co.*, 98 NLRB 800 (1952).

[17] *Union Starch & Refining Company*, 87 NLRB 779; 186 F. 2d 1008, 1011-1012 (C. A. 7, 1951), cert. den. 342 U. S. 815.

[18] *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17.

[19] The *Public Service* case was decided after Taft-Hartley became effective, with full knowledge by the Board of the provisions and policy of the later statute.

a contract, was intended to be "permissive and not exclusive in character;" that it merely set the *maximum* limits of union security which may be negotiated; and that *lesser* forms of union security, e.g., an agency shop, were clearly permitted. We believe the case is manifestly sound. During the Taft-Hartley period, the Board, in *American Seating*, expressly reaffirmed the holding in *Public Service*, stating:

> "As the precise language of the 8(3) proviso in the Wagner Act was continued in the amended Act with certain added qualifications not pertinent here, and because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining *support payments from nonunion* [fol. 63] *members who would otherwise be 'free riders,'* we find that the provision for support payments in the instant contract does not exceed the union-security agreements authorized by the Act." 98 NLRB 800, 802 (1952). (Emphasis added.) [20]

The *Union Starch* construction of Section 8(a) (3) has been an accepted and settled rule in a great many Board and court cases. In those cases, even where "membership" is specifically required in a valid union-security contract, the union in particular situations cannot enforce the actual membership requirement but can obtain at most the periodic dues and initiation fees. Thus, a contract, such as the agency shop, which requires only that which the union under the Act can realistically and effectively enforce as to

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[20] In the provisos to both Sections 8(3) of the Wagner Act and 8(a) (3) of the Taft-Hartley Act, the public policy is stated: "That nothing in this Act, *or in any other statute of the United States*, shall preclude an employer from making [such] an agreement * * *." (Emphasis added.) See *Algoma Plywood & Veneer Co. v. W. E. R. B.*, 336 U. S. 301. In making this statement of policy, did Congress intend to place upon the described form of union security provision as to which it was thus proclaiming immunity from all its laws, a technical restriction, to-wit, that it must contain a "membership" requirement and nothing else?

all employees in this case must in all reason and equity be held lawful.

In the *Radio Officers'* case,[21] the Supreme Court recognized that:

> Lengthy legislative debate preceded the 1947 amendments to the Act which thus limited permissible employer discrimination. *Thus legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about 'free riders,'* i.e., employees who receive the benefits of union representation but are unwilling to [fol. 64] contribute their share of financial support to such union, and *gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.* (Emphasis added.)

Certainly the Supreme Court clarified that which Congress sought to permit in the area of union security and that which it sought to limit. While Section 8(a) (3) is couched in terms of "membership," the Court noted that the term had been "too restrictively interpreted" (by the Eighth Circuit). The Supreme Court provided a construction of that term and the whole Section in keeping with the basic policy of the amended Act, namely, "*to insulate employees' jobs from their organizational rights.*"[22] By such a reading, the court gave effect to the main thrust of the entire Section, which is to protect employees in their hire or tenure of employment; and this was accomplished by qualifying the requirement of "membership" with the protection against discharge so long as the employee tendered the requisite periodic dues and fees.[23]

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[21] *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 40-41.

[22] 347 U. S. at 40.

[23] As stated by Senator Taft, "*In other words, what we do, in effect, is to say that no one can get a free ride in such a shop* • • • The employee *has to pay the union dues.*" (Emphasis added.) 93 Cong. Rec. 3953, April 23, 1947.

In view of the foregoing, we are unable to distinguish, so far as its legality is concerned, the instant agency shop proposal from any other union-security proposal which predicates a right of discharge *only* upon an employee's failure to tender the equivalent of regular union dues and initiation fees. The Union sought to bargain concerning a clause which would leave the final decision as to membership or nonmembership with each individual employee, *at his option*, but nevertheless, to condition employment upon the payment of sums of money which would constitute each employee's share of financial support. In our opinion, such a proposal fully comports with the Congressional intention [fol. 65] in Section 8(a) (3) for the allowance of union-security contracts; and, therefore, is a mandatory subject as to which the Respondent is obliged to bargain.

Consequently, having refused to bargain with respect to such proposal, we find that the Respondent violated Section 8(a) (1) and (5) of the Act, as alleged in the complaint as amended.[24]

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent, occurring in connection with the Respondent's operations, have a close, intimate and substantial relationship to trade, traffic and commerce among the several States, and tend to lead to labor disputes obstructing commerce and the free flow of commerce.

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[24] It is beyond the Board's authority to tell the parties what specific result they should reach in bargaining. *N. L. R. B. v. American National Insurance Co.*, 343 U. S. 395 (1952). Accordingly, by concluding that the proposed agency-shop agreement is a lawful and mandatory subject for bargaining, we do not impose a duty upon the Respondent to execute such an agency-shop clause, or any other clause; the duty imposed goes no further than to direct the Respondent, upon request, to bargain in good faith thereon.

V. Conclusions of Law

Upon the foregoing findings of fact and upon the entire record, the Board makes the following conclusions of law:

1. International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. All employees covered by the national agreement between GM and UAW, dated October 2, 1958, constitute a unit appropriate for the purposes of collective bargaining within the meanng of Secton 9(b) of the Act.

[fol. 66] 3. The above-named Union, on October 20, 1959, and at all times since, represented a majority of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act, and at all material times has been and now is the exclusive representative of said employees.

4. By refusing on October 27, 1959, and at all times thereafter, to bargain collectively with the above-named Union, as the exclusive representative of its employees in the aforesaid appropriate unit concerning the agency-shop proposal made by the Union, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7, of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that

the Respondent, General Motors Corporation, Detroit Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, as the exclusive representative of all production and maintenance employees and mechanical employees in engineering department shops in the plants or facilities of the Respondent covered by the national agree-[fol. 67] ment between the UAW and GM, dated October 2, 1958, including the employees at the Respondent's plants in Anderson, Bedford, Kokomo, Indianapolis, Marion and Munice, Indiana, (1) concerning the terms of an agreement supplementary to the existing national agreement under which non-member employees in the bargaining unit at the aforesaid Indiana plants and new employees to be hired therein would be required as a condition of continued employment after 30 days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay to the UAW a sum equal to the initiation fee charged by the local union involved and monthly sums equal to the regular dues required of UAW members at each location; or (2) concerning like or related agency-shop proposals.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act to bargain collectively through representatives of their own choosing.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named labor organization, as the exclusive representative of the employees in the aforesaid unit (1) with respect to the proposal of UAW to enter into an agreement, supplementing their national agreement,

to provide that employees represented by UAW in GM plants in Indiana and new employees hired at those plants thereafter would be required as a condition of continued employment after 30 days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay to the UAW a sum equal to the iniation fee charged by the local union involved and monthly sums equal to the dues required of members at each location, and if an understanding is reached, embody such understanding in a [fol. 68] signed agreement; or (2) with respect to like or related proposals.

(b) Notify the Regional Director for the Seventh Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.[25]

Dated, Washington, D. C.

Frank W. McCulloch, Chairman, Philip Ray Rodgers, Member, John H. Fanning, Member, Gerald A. Brown, Member, National Labor Relations Board

(Seal.)

MEMBER LEEDOM, Dissenting:

For the reasons set forth hereinafter, I believe that the complaint should be dismissed. Even though the "agency shop" agreement has been held to be lawful under the law of Indiana, a "right-to-work" State, it is, in my opinion, unlawful under the National Labor Relations Act in such a State. I do not, as my colleagues assert, construe state law to interpret federal, but, rather confine myself strictly to the federal Act.

The record discloses that, under the agency shop pro-

[25] At the hearing, the parties stipulated that, in the event that the Board found that the Respondent violated Section 8(a) (5) of the Act, they "specifically waive any remedy requiring the posting of notices by Respondent." In accordance with the stipulation, we omit the usual remedy with respect to posting notices.

posed, non-members would not as a matter of right be eligible to participate in union meetings, to vote on ratifications of agreements, or to vote on how their "support money" was to be spent. They would not be entitled as a matter of right to receive the Union's publication, or strike benefits, to participate in the Union's educational fund, or [fol. 69] to have any of the other benefits guaranteed union members. Thus, although non-members would be required to pay to the UAW the equivalent of the initiation fee and dues paid by members, they could be denied benefits, available to members which would be available to them, without additional financial burden, if they became members. Moreover, even with respect to UAW practice, counsel for the UAW stated at oral argument that "probably a non-member [subject to the agency-shop provision] would not vote in the strike vote." In these circumstances, non-members would necessarily be encourged to become members. For, as the courts have held, the existence of discriminatory benefits, based on union membership, "is inherently conducive to increased union membership • • • by increasing the number of workers who would like to join and/or their quantum of desire,"—even though the Union would reject all applicants for membership.[26] If this is so when the union is closed, *a fortiori* is it so when, as here, the union is open. That the payment of money to a labor organization assists that organization is self-evident.

In my view, such a union-security agreement necessarily interferes with the Section 7 right of employees to refrain from assisting, and encourages membership in, a labor organization. It is, therefore, unlawful under Secton 8(a) (1) and (3) in any jurisdiction, unless it is saved by the proviso to Section 8(a) (3) of the Act. That proviso permits an employer to make an agreement with a labor organization "to require as a condition of employment *membership* (emphasis supplied) therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is later • • •" There is, however, no other provision of the Act which specifically legalizes the interference and encouragement inherent in

[26] *N. L. R. B. v. Gaynor News Co.*, 197 F. 2d 719, 722-723 (C. A. 2), affirmed 347 U. S. 17.

an agency-shop arrangement; and the only question here is whether such an arrangement can be lawful under the National Labor Relations Act in a State like Indiana, where [fol. 70] it is clear that an agreement requiring literal membership [27] is prohibited by state law. To hold the agency shop lawful, one would have to conclude that Congress intended the word "membership" in Section 7 and 8(a) (3) to encompass not only literal membership, but also other relationships between employees and the union, while at the same time intending that the same word in Section 14(b)[28] encompass only literal membership, or further, that Congress in-

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[27] By "literal membership" I mean the right of a union to require actual membership as a condition of employment, and a willingness to admit to membership all employees who tender the requisite initiation fees and dues; cf. *Union Starch & Refining Company*, 87 NLRB 779; *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17. Neither of these cases stands for the proposition that payment of initiation fees and dues can be required when literal membership cannot.

[28] Unlike my colleagues, who find that the terms of Section 14(b) "need not be reached," I find that such terms *must* be interpreted and reconciled with the comparable terms in the first proviso to Section 8(a) (3). There are a number of states which have "right-to-work" laws; not all of them are drawn in the same terms and not all have received the same interpretation by the competent state authorities. In holding that the proposal here is lawful under the Section 8(a) (3) proviso because the Indiana Court has held an agency shop to be valid under Indiana law, my colleagues are necessarily holding that they will follow State law in this area, whatever that law may be and however it may vary from State to State. Such a view, in my opinion, runs counter to the basic Congressional purpose of establishing a uniform national labor-management relations policy. Although Congress in enacting Section 14(b) departed from that policy in a limited area, to the extent of permitting the individual States to determine that the Section 8(a) (3) proviso would be wholly inapplicable, it did not in my view so far depart from that policy that the Section 8(a) (3) proviso could conceivably have a different meaning in each of the 50 States and the Territories.

tended the word "membership" to mean one thing in Indiana and a different thing somewhere else. Such reasoning I am not prepared to accept. Thus, the conclusion is inescapable that an agency-shop arrangement, whatever its status under Indiana law, cannot be lawful under the National Labor Relations Act in a state like Indiana where employment cannot lawfully be conditioned on literal membership. For as already pointed out, the agency shop clause, through the disparity of benefits provided as between union [fol. 71] members and non-members—all paying the same fees and dues—would permit the union and the employer inevitably to coerce the employees into joining the union. In this way, for all practical purposes, the very thing is achieved that the federal statutes guarantees shall not be required of employees in a "right-to-work" state quite as effectively as if the union contract expressly provided for union membership as a condition of continued employment. For who can say as a verity that a man forced to buy a cake will not eat it. It should not strain perspicacity to see here a classic example of a technique condemned by the law since ancient times under the principle "when anything is prohibited directly, it is also prohibited indirectly."

Moreover, in a "right-to-work" state where freedom not to join a union is guaranteed, it cannot be said that an employee submits to a "lesser" form of union security than membership, as the term *lesser* is used by my colleagues of the majority where, as here, there is exacted from him all the *requirements* of membership without the *benefits* which derive from membership. And it is not an answer to say that the employee can join, because that is giving him an alternative which he cannot be required to take in a "right-to-work" state. The device of the agency shop, where "membership" is unlawful, is such an impairment of an employee's freedom that, in my view, it is a travesty to condone the imposition of such device when the Act forbids the requirement of literal membership.

In view of the foregoing, I am satisfied that the reliance of the General Counsel and the UAW on *Public Service of Colorado*, 89 NLRB 418 and *American Seating Co.*, 98 NLRB 800 is misplaced. For, unlike the instant matter, both cases involved a valid agreement, requiring membership as a condition of employment, which was protected

under the first proviso to Section 8(a) (3); and neither case involved a "right-to-work" jurisdiction. Significantly, in both *Public Service* and *American Seating*, no legal impediment existed to preclude the parties from entering into the contracts requiring all employees to be union members, and they made such contracts. Thus the choice extended to the [fol. 72] employees there, between membership and support which did not involve membership, is wholly different from the "Hobson's choice" which the UAW would extend to the employees here.

Based on the foregoing considerations, I conclude that the agency-shop clause concerning which UAW requested GM to bargain is, under the National Labor Relations Act, illegal in Indiana, and that GM was under no obligation to negotiate concerning such a clause with UAW. Accordingly, GM not having violated the Act as alleged, the complaint should be dismissed.

Dated, Washington, D. C.

Boyd Leedom, Member, National Labor Relations Board

(Seal.)

[fol. 73] BEFORE THE NATIONAL LABOR RELATIONS BOARD, SEVENTH REGION

Case No. 7-CA-2560

In the Matter of: GENERAL MOTORS CORPORATION, RESPONDENT, AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Charging Party.

EXCERPTS FROM STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF FEBRUARY 10, 1960

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: Mr. Albert P. Wheatly, Trial Examiner.

APPEARANCES:

Mr. George Cherpelis, 1600 Industrial Building, Detroit 26, Michigan and Mr. Herman Corenman, 1600 Industrial Building, Detroit 26, Michigan, appearing as Counsel for the General Counsel; Mr. Harry S. Benjamin, Jr., and Mr. K. D. Mann and Mr. E. L. Hartwig, (For Henry M. Hogan, General Counsel), 3044 West Grand Boulevard, Detroit 2, Michigan, appearing on behalf of General Motors Corporation, the Respondent; Mr. Harold A. Cranefield, General Counsel, and John A. Fillion, 8000 East Jefferson Avenue, Detroit 14, Michigan, appearing on behalf of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, the Charg-[fol. 74] ing Party; Mr. Owen J. Neighbours, Cadick, Burns, Duck and Neighbours, 1350 Consolidated Building, Indianapolis, Indiana, representing Raymond E. Lewis, et al.

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PROCEEDINGS

* * * * * * *

COLLOQUY BETWEEN TRIAL EXAMINER AND COUNSEL

Mr. Cherpelis: At this time, Mr. Examiner, I would like to propose the following stipulations:

One: That on or about October 20, 1959, by letter of that date, the Union made a demand upon Respondent to bargain, requesting that Respondent appoint a time and place for a meeting between representatives of the Union and of the Respondent for the purpose of collective bargaining concerning the exact terms of the proposed supplementary agreement to their existing National Agreement, whereby Respondent's employees represented by the Union in Respondent's plants and facilities located in Anderson, Bedford, Kokomo, Indianapolis, Marion and Muncie, Indiana not already members of the Union and new employees hired thereafter should be required as a condition of continued employment after—could we go off the record, for a second please?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record. All right, Mr. Cherpelis.

Mr. Cherpelis: —after thirty days following the date of such supplementary agreement or of their initial employment, whichever is later, to pay to the Union a sum equal to the initiation fee charged members at each of the Union's local unions, herein called locals, involved, and monthly sums equal to the regular dues required of the Union's or Local's members at each location.

May that above paragraph be stipulated to?

Trial Examiner: So stipulated, Gentlemen?

Mr. Benjamin: So stipulated by the Respondent.

Mr. Cranefield: Stipulated by the Charging Party.

. . . . . .

[fol. 75] Mr. Cherpelis: And offering the following stipulation: May it be stipulated and agreed among the parties that the document marked for identification as General Counsel's Exhibit 2(a) is a true and accurate copy of the letter sent by the Union to the Respondent referred to in the preceding paragraph, and—

Mr. Cranefield: Stipulated.

Mr. Cherpelis: —and may it be further stipulated and agreed among the parties that this document be received in evidence as General Counsel's Exhibit 2(a) for the purpose of showing the request made by the Union, and not for the purpose of establishing the validity of other matters therein alleged? May it be so stipulated?

Mr. Benjamin: So stipulated on behalf of the Respondent.

Mr. Cranefield: So stipulated by the Charging Party.

. . . . . .

Mr. Cherpelis: May it be further stipulated that on or about October 27, 1959, by letter of that date, Respondent answered the Union's letter identified in General Counsel's Exhibit 2(a), stating, among other things, "Because we are of the opinion that an 'agency shop' agreement such as that previously proposed by you and as now detailed in your letter of October 20, 1959, would violate the National

Labor Relations Act, as amended, if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request for a meeting for the purpose stated in your letter of October 20, 1959", and Respondent has continued to decline to meet with the Union for the purpose requested in General Counsel's Exhibit 2(a).

I will now ask the reporter to mark for identification General Counsel's Exhibit 2(c).

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 2(c) for identification.)

Mr. Cherpelis: I offer the following stipulation:

Trial Examiner: Let's give the reporter a little time. Now, how about this last stipulation? Is that acceptable with everybody?

[fol. 76] Mr. Benjamin: So stipulated on behalf of the Respondent.

Mr. Cranefield: So stipulated by the Charging Party.

. . . . . .

Mr. Cherpelis: May it be further stipulated and agreed among the parties that the reason Respondent did decline to comply with the request of the Union, General Counsel's Exhibit 2(a), and did decline to bargain concerning or enter into such proposed supplementary agreement, was that to do so would be violative of the National Labor Relations Act, as amended.

Trial Examiner: So stipulated, gentlemen?

Mr. Benjamin: So stipulated by the Respondent.

Mr. Cranefield: And on behalf of the Charging Party.

. . . . . .

Mr. Cherpelis: Will the parties further stipulate and agree that among Respondent's employees employed in its plants in Anderson, Bedford, Indianapolis, Kokomo, Marion and Muncie, Indiana, there are employees not contended, for purposes of this proceeding, to constitute a majority, who are within the bargaining unit described in paragraphs 6(a) and 6(b) of the Complaint, and who have been so employed in excess of ninety days, and who are not now

members of the Union or its Locals, and who do not desire to become members of the Union or its Locals, and who would not desire to make support payments to the Union or its Locals should a type of agreement such as that proposed by the Union, and identified by it as an "agency shop" agreement, be entered into supplementally to General (18) Counsel's Exhibit 2(b), the National Agreement.

* * * * * * *

[fol. 77] WOODCOCK, LEONARD:

Direct Examination.

By Mr. Benjamin:

Q. Will you state your name and title, please?

A. Leonard Woodcock, Vice President of the International Union, UAW, and Director of the General Motors Department.

Q. How long, Mr. Woodcock, have you been an employee of the International Union?

A. With brief intervals, since September of 1940.

Q. And how long, Mr. Woodcock——

A. I mean with the exception briefly.

Q. How long, Mr. Woodcock, have you been a vice-president of the International Union, UAW?

A. Since the Spring of 1955.

Q. And how long, Mr. Woodcock, have you been the head of the General Motors Department?

A. Since December of 1955.

(Thereupon, a document was marked Respondent's Exhibit No. 1 for identification.)

By Mr. Benjamin:

Q. Mr. Woodcock, I hand you what has been marked for identification as Respondent's Exhibit Number 1, a booklet, and ask you if you can tell us what that is?

A. This is a copy of the Constitution of the International

Union, UAW, as adopted at its convention and amended at that convention in April of 1957.

Q. Attached or stapled to the exhibit which you have identified is a small grey pamphlet which I believe to be the amendments to the principal exhibit, is that not correct? The amendments as of January, 1958?

A. These were additional amendments made at a special convention in January of 1958, yes, sir.

Q. Mr. Woodcock, are you the same Leonard Woodcock whose name is set forth on the last page of the document I have handed you, and identified as International Vice President?

[fol. 78] A. Yes, sir, I am.

Q. And that is the Constitution of the Union of which you are a Vice President, and that is the same Union of which you are the head of the General Motors Department, is that correct?

A. That's right; yes sir.

Mr. Benjamin: I offer in evidence Respondent's Number 1.

Trial Examiner: Are there any objections?

Mr. Coreman: We object to it as immaterial. I don't know what the relevance or materiality of the exhibit is.

Mr. Cranefield: I think the purpose for which it is offered ought to be stated, Mr. Examiner.

Trial Examiner: Mr. Benjamin?

Mr. Benjamin: Well, the Union, in General Counsel's Exhibit 2(a), sets forth a type of union security which it has asked the Respondent to discuss, and it describes that form of union security as being dependent upon a sum being equal to the initiation fee charged at each of the local unions involved and monthly sums equal to the regular dues required of the members at each location.

Now, I can't think of any better document that would describe what a member is or what the dues might be or the initiation fee might be, than the Union's Constitution.

For that reason, I think it is very relevant and material to the issues involved here.

• • • • • • •

Trial Examiner: I am going to receive the document.

Mr. Benjamin: Respondent's Exhibit 1 is accepted in evidence?

Trial Examiner: Right.

By Mr. Benjamin:

Q. Now, Mr. Woodcock, you have been a member of the Union for how long?

A. Ever since the organization of the UAW, as such.

Q. Which dates back to? That goes back to what date, approximately?

[fol. 79] A. The South Bend Convention in 1936.

Q. You have been associated with the Union continuously since that time?

A. Yes, sir.

Q. In some capacity

A. Yes.

Q. At the present time are you a member of the UAW's International Executive Board?

A. Yes, sir. I am.

Q. And, Mr. Woodcock, over the past several years have you been a regular attendant or delegate to the UAW's National Conventions?

A. I have been present at every convention from 1940 to date, either as a delegate or a representative of the International Union.

Q. We can assume, therefore, Mr. Woodcock, that you are thoroughly familiar with the union's constitution, can we not?

A. I would say reasonably conversant.

. . . . . .

Q. I will ask you, Mr. Woodcock, as to whether General Counsel's Exhibit 2(b), which is the current National Agreement between General Motors Corporation and the UAW, has any union security provisions in it?

A. Yes, sir, it does.

Q. Now, handing you General Counsel's Exhibit 2(b), I will direct your attention to Section (4b) of the agreement, which commences on page three and runs over to the top of page four, and ask you if you will examine that.

A. Yes, sir. I have.

Q. Now, after having examined that particular clause, can you tell us whether the union security provisions in this agreement are applicable to employees represented by your union under this agreement in the Indiana plants covered by your Charge?

A. Under the stipulation of (4b), as written without a further understanding of a meeting of the minds relative thereto on the text as it appears, the answer would be no.

[fol. 80] Q. And why do you say that, Mr. Woodcock?

A. Because it specifies particularly that an employee shall not be required to become a member of or continue membership in the Union as a condition of employment if employed in any state which prohibits or otherwise makes unlawful membership in a labor organization as a condition of employment.

Q. And it is the union's understanding that there is a law in Indiana which prohibits membership in a union as a condition of continued employment, is that correct?

A. Yes, sir.

* * * * * * *

By Mr. Benjamin:

Q. Does the UAW have members among the employees covered by this agreement at each of the locations covered by the Charge herein?

A. Yes, sir, we do.

Q. In order to become members of the union would these employees pay an initiation fee?

A. Unless they were coming with a transfer card from another UAW Local Union, or, in many instances, from other unions, in which event we accept such transfer card in lieu of the initiation fees.

Q. Well, that would indicate a previous membership in the union, would it not? A transfer card?

A. A transfer card? In some union, yes, sir.

Q. Assuming you are not talking about an individual who has previously belonged to the union, he would have to pay an initiation fee in order to become a member of the union, is that right?

A. Normally, yes, sir. I say "normally" because on oc-

casion we do waive, by action of the International Executive Board, the requirement of payment of initiation fees.

Q. But that would be the unusual exception rather than the rule, would it not?

A. It is abnormal, yes, sir.

Q. And these employees who are admitted to membership after having paid an initiation fee, are they required to pay monthly dues thereafter?

A. Under the stipulated requirements of our constitution, which is that of working forty hours or more in any [fol. 81] given month, they are then required to pay the dues as stipulated.

Q. In other words, under normal circumstances a man who has been admitted to membership after payment of his initiation fee would thereafter be required, in the normal case, to pay monthly dues in order to remain a member in good standing, is that not correct?

A. Yes, sir.

Q. Now, are these employees of General Motors Corporation who are working in the nine plants covered by your charge herein, and who are represented exclusively by the UAW, and who are also members of the Union, entitled to all of the privileges and benefits spelled out in the union's constitution as long as they remain members in good standing?

A. Yes, sir. They are.

Q. May I ask you, Mr. Woodcock, directing your attention to General Counsel's Exhibit 2(a), if you are familiar with the proposal made to General Motors Corporation to consider meeting for the purpose of entering into an agreement such as is spelled out in that exhibit?

A. Yes, I am.

Q. Will you tell us, after examining that exhibit, what the requirements would be for an employee in one of the Indiana plants to continue in employment if that agreement, as proposed, were to be executed?

Mr. Cranefield: May I hear that question read by the reporter?

Mr. Benjamin: May I withdraw the question?

Trial Examiner: All right, if you want to restate it.

By Mr. Benjamin:

Q. Is it not true that the agreement which the union proposed in its letter of October 20th to General Motors Corporation, and which is set forth in General Counsel's Exhibit 2(a), would condition the continued employment in the nine General Motors plants involved in your Charge, upon the payment of a sum equal to the initiation fee usually charged members, and, thereafter, the payment of a monthly sum equal to the regular dues usually charged members?

[fol. 82] Mr. Cranefield: Mr. Examiner, the exhibit speaks for itself. I think that Mr. Benjamin is quite accurately paraphrasing it, but I see nothing to be gained, for the advantage of the Board in deciding the case, in this paraphrasing of it. The exhibit speaks for itself. I see no mistake in his statement of it, but why paraphrase it?

Trial Examiner: I am inclined to agree, Mr. Benjamin, and I would like to hear from you on this.

Mr. Benjamin: Well, I wanted to make sure that Mr. Woodcock fully understood this proposal. It was made some four to five months ago, and it is simply for the purpose of making sure that he is thoroughly familiar with it at this time.

Trial Examiner: I suggest that you go on with your next question.

Mr. Benjamin: All right.

By Mr. Benjamin:

Q. State whether or not it is the union's proposal that non-members of the Union in Indiana will be able—would be able to continue their employment in General Motors plants only if they paid an amount equal to the initiation fee charged to members and if they paid monthly thereafter an amount equal to the dues usually paid by members in the General Motors plants covered by your Charge?

A. It is my understanding that our proposal would require the payment of a service fee from those who chose not to be members, and would be a condition of their continued employment.

Q. It is true, is it not, Mr. Woodcock, that the union recognizes that it has an obligation, as a certified collec-

tive bargaining agent of the General Motors employees in their nine locations specified in your Charge, to represent all employees, whether they are members or not?

A. Yes, sir, we do.

Trial Examiner: May I see that Exhibit 2(a)? No, the letter.

Mr. Benjamin: The letter? Oh, yes.

Trial Examiner: Thank you. The reason I asked for the exhibit, the witness used a term that I didn't think was [fol. 83] in the exhibit, and I don't see it in there. "Service fees from those who chose not to be members". I didn't recall anything in there that gave them a choice.

* * * * * * *

Mr. Cranefield: If I may be permitted, Mr. Examiner, I would suggest that neither you nor the Board ought to infer from the term used by the witness the idea that any other proposal than that embodied in the letter is in his mind.

The term "service fee", I took it to be his characterization of the payment that would be required under the proposal outlined in the letter, which is an exhibit.

Trial Examiner: I just want to be sure what issue I have before me. I just want that to be clear. The only one I have before me is the proposal in that letter, is that correct?

Mr. Cranefield: That's correct. There are no other issues.

Trial Examiner: Do you agree with that, Mr. Benjamin?

Mr. Benjamin: Just one second, please. Well, Mr. Examiner, I think the witness apparently is familiar with the proposal, and I assume if there is any ambiguity now he has the opportunity to clarify it in any way that he may wish to.

Trial Examiner: I am also going to be clear as to what I am going to decide. I want to know what position you are taking, and I'm going to ask the General Counsel what position he is taking.

Mr. Benjamin: Yes, sir.

Mr. Cranefield: Let me state our position, Mr. Examiner. I don't want any confusion to develop here.

Mr. Woodcock, in the letter of October 20th—I believe is the date—which is an exhibit—characterized the proposal as a proposal for an agency shop. That was the term used in the letter. In his last response to Mr. Benjamin's question he characterized the payment that would be required under the contract, as proposed, as a service fee. It was a mere characterization of the payment.

[fol. 84] Trial Examiner: Look, gentlemen, we are doing a lot or needless sparring here, I think. The issues are as framed in the Complaint and the Answer?

Mr. Cranefield: Right.

Trial Examiner: Which clearly we are talking about, this proposal; not some other proposal?

Mr. Benjamin: That's correct.

Trial Examiner: All right. Let's go on.

* * * * * * *

Trial Examiner: Obviously if you had honored the demand and come to the bargaining table they might have come up with some other proposal, but that isn't the thing I have before me. I have enough problems deciding the issues before me, without getting any more.

Mr. Cranefield: I am sure that no party intends to enlarge the issues or change them.

* * * * * * *

By Mr. Benjamin:

Q. Mr. Woodcock, would you take Respondent's Exhibit 1 or Respondent's Exhibit 2 whichever one you want to refer to. Turning now to the Constitution of the Union, would you point out the provision or provisions, if any, which deal with the type of agreement proposed by the Union and as described in General Counsel's Exhibit 2(a), and which the respondent has declined to enter into?

Mr. Cranefield: I object to that question. There has been no foundation, for one thing. There is no testimony that the proposal which underlies the charge reflects any provision of the union's constitution.

Mr. Benjamin: Well, now, Mr. Cranefield, if you want to testify that's something else.

Trial Examiner: Let me go a little bit deeper. Supposing that the proposal, General Counsel's Exhibit 2(a), is contrary to the Constitution? What difference would it make?

Mr. Benjamin: Well, Mr. Woodcock has testified that he recognizes that the Union has the obligation to represent all employees, whether they are members or not.

[fol. 85] Now, he has also testified that the Constitution sets forth the rights of members. What I am interested in finding out is whether this particular proposal which is made in this letter is contained or if there is anything in that Constitution that would relate to this proposal because presumably it has to do with non-members. They have an obligation to represent both. * * *

* * * * * * *

Mr. Benjamin: He says they recognize they have that obligation.

Trial Examiner: I heard him say that, but it is still a question of law, and I will have to be guided by what the Courts say.

The other point that I'm asking you is what difference does it make whether the Constitution relates to this matter or not? Supposing it's contrary to the Union Constitution? Would that throw any light on the matter, on whether or not the demand is a lawful or an unlawful demand?

Mr. Benjamin: It may very well.

Trial Examiner: Why?

Mr. Benjamin: Because if there are provisions in the Constitution that relate or establish certain rights, benefits and privileges for members, but do not for non-members, it may have a distinct bearing on whether this particular proposal is discriminatory.

Trial Examiner: Well, I don't see how at the moment. I am going to let him answer the question. Maybe it will become clearer then than it is, depending on his answer. Go ahead.

Mr. Cranefield: I think the witness should have the benefit of a re-reading of the question.

Trial Examiner: All right, read it back, please.

(The reporter read as follows: "Question: (By Mr. Benjamin) Mr. Woodcock, would you take Respondent's Exhibit 1 or Respondent's Exhibit 2—whichever one you want to refer to. Turning now to the Constitution of the Union, would you point out the provision or provisions, if any, which deal with the type of agreement proposed by the [fol. 86] Union and as described in General Counsel's Exhibit 2(a), and which the respondent has declined to enter into?").

The Witness: The sum equivalent to the union members' obligation—as far as the monthly dues and initiation fee is concerned—is spelled out in Article 16, and as specifically there spelled out is utilized by the Union in its determination under the Union Shop contracts as they have existed in Indiana, and has been used in Canada under similar formula provisions.

By Mr. Benjamin:

Q. Is that to say that in fixing the amount of the initiation fee or the amount of monthly dues under an agency shop provision they are the same or equivalent to the initiation fees and dues spelled out there for members?

A. Yes, sir.

Q. Is there anything in the Constitution of the Union which sets forth the rights, benefits and privileges of non-members of the union who may, nevertheless, be represented by the union for collective bargaining purposes?

A. Not specifically, sir; but, in this connection, we extend to people under these provisions all of the rights which they wish to accept.

Q. Do you permit a non-member of the Union to participate in union meetings without the payment of an initiation fee or membership dues?

A. No, sir.

Q. Do you permit a non-member of the union to vote on the ratification of an agreement entered into or negotiated by you? Do you permit non-members to vote in that ratification?

A. No, sir.

Q. With respect to the employees which you represent in the Indiana plants of General Motors Corporation who

are members of the union, and who are required—as a condition of continued employment—to maintain their membership by the payment of an initiation fee and monthly dues, does your Constitution indicate how their monthly dues are to be distributed?

[fol. 87] A. Yes, sir. It does.

Q. Now, is that taken care of in Article 16, Section 12, of the Constitution?

A. Section 12 deals with part of the assignment of the total dues. Article 16 in various parts deals with all of it.

Q. Directing your attention, Mr. Woodcock, to Article 16, Section 12, is there any provision in there that indicates what portion of an employee's dues go for the support of the union's official paper, "Solidarity"?

A. Yes, sir. It prescribes a five-cent allotment per member for that purpose.

Q. Who is entitled to get that paper? Your Union's official organ?

A. All of those who are on the rolls of the union.

Q. And that is everyone who is a member, is that correct?

A. Oh, in many cases it goes beyond those who are members.

Q. Is there any provision in the Union's Constitution that the paper must be distributed to non-union members?

A. Not specifically, no, sir.

Q. As a matter of fact, a non-union member cannot get it without paying an additional fee, isn't that correct?

A. No, I think many do get it.

Q. I beg your pardon?

A. Many do get it. Non-members in Canada get it because they are carried on our rolls.

Q. Do non-members in Indiana get it?

A. If they are——

Mr. Cranefield: As of now?

Trial Examiner: I take it as of now, yes.

The Witness: If they are non-members in the sense of non-paying to any extent then the chances are the answer would be "no", but non-members in agency shops in Indiana do get it, yes, and they are carried on our rolls.

By Mr. Benjamin:

Q. I direct your attention to Article 28, Section 6, and ask you if the Constitution there does not provide "to non-members the rate shall be one dollar per annum, with postage additional for foreign subscribers"?

[fol. 88] A. Yes, sir, it specifies that.

Q. Now, "Solidarity" is the International Union's official publication distributed to all members, is it not?

A. Yes, sir.

Q. And the Constitution so provides, of course?

A. Yes, sir.

Q. That publication is used for informing members of current developments within the union, as to all matters relating to wages, hours and conditions of employment, is that not correct?

A. Yes, sir.

Q. Is there any provision in the Union's Constitution whatsoever that would require or permit any part of the monthly dues paid under an agency shop provision to go to the support of the "Solidarity" publication?

A. It is done as a matter of practice.

Q. Is there anything in the Constitution that requires it?

A. No, sir.

Q. I now direct your attention to Article 16, Section 12-C and ask you whether, under the language there, a percentage of a member's compulsory dues go to a retired-members fund which is used to promote and support programs benefiting retired members?

A. That so states, yes, sir.

Q. What provision is there in the Union's Constitution for the development and extension of such benefit programs to non-members represented by your union who have paid an amount equivalent to the monthly dues paid by members?

A. Well, elsewhere in the Constitution in this particular it is specified that our Retired Members Programs are to be integrated with community programs and the funds pooled for that purpose without regard to previous membership in the UAW.

Q. But there is no specific provision in the constitution at the present time which makes it mandatory to take any

of the dues paid under an agency shop arrangement and use them for such recreation programs, is there?

[fol. 89] A. Yes, sir. As I tried to say, the Constitution demands that where a community program is in effect that, apart from the question of agency shop, our local unions are to cooperate with such community programs in the spending of this one-cent allocation.

Q. But where there is an agency shop provision. You say apart from that. But where there is an agency shop provision is there any provision in the Constitution that says that the moneys collected in the form of dues from such non-members must in some way be diverted to these Retired Members Funds?

A. It would equally apply, yes, sir.

Q. Is there anything in the Constitution which requires that, Mr. Woodcock?

A. Yes, sir. I have tried to indicate that there is.

Q. Is that—what is the situation if there is no community program?

A. The local union then set up its own program and endeavors to develop a community program.

Q. But that is not required under the Constitution, is that correct?

A. It's required under the Constitution, and our policy under that Constitution.

Q. Now, turning your attention to the subject of education, look at Article 16, Section 12.3. With respect to members who are required to pay monthly dues as a condition of membership, is a portion of those dues diverted to an Educational Fund?

A. Yes, sir.

Q. Is there anything in your Constitution which specifically requires that the amounts collected in the form of monthly dues from non-members must go to an Educational Fund from which they could benefit?

A. Not specifically, no, sir. It is our general practice to have such a program open, however.

Q. Now, directing your attention to Article 16, Section 2, as amended by the Convention action in January of 1958, [fol. 90] or as amended at your most recent convention, is it not true that a portion of the monthly dues paid by a member goes into a strike fund?

A. Yes, sir.

Q. And is it not true that under certain conditions, determined by the Union, a member who is engaged in a strike may receive benefits from the fund, the strike fund set up as a result of monthly dues contributions?

A. Yes, sir.

Q. Is there any thing in the Union's constitution which specifically provides for the allocation of moneys collected from Non-members, anything that provides for the allocation of moneys collected from non-members' dues to a strike fund?

A. They have and they do, under the agency-shop provisions and the formula provisions.

Q. Is there anything in the Union's constitution which specifically covers or specifies that the amounts collected from a non-member in the form of monthly dues must be diverted or will be diverted to a strike fund from which they can benefit?

A. We have always construed, Mr. Benjamin, this Constitution to say that where the sum required is equivalent to that of a member that then they are entitled to the same benefits as a member unless they themselves choose not to make them available to them.

Q. Is there anything in the union's constitution that specifically so provides?

A. Well, because our constitution isn't written in terms of non-members, I can't say that it is, but we understand it under the terms of the application of Article 16 and all of the concomitant paragraphs.

Q. In other words, the union's constitution is written exclusively for members, is it not?

A. It is written in the sense of membership.

Q. I think you have already indicated, have you not—just so it is clear—that there is no provision in the Union's constitution for non-members to vote with respect to the ratification of any agreement that may have been negotiated on behalf of employees you represent?

[fol. 91] A. In terms of our membership ratifications, no, sir.

Q. Well, is there anything in the union's constitution which specifically spells out or protects the rights of the

non-members who are represented exclusively by the union pursuant to a live certification issued by the NLRB?

A. No, sir.

Mr. Benjamin: Just one second, Mr. Trial Examiner.

By Mr. Benjamin:

Q. Mr. Woodcock, if a member pays dues and initiation fees in Indiana under your proposed agreement would he still have to pay the service fee as a condition of employment?

Mr. Cranefield: May I hear that question again?

Trial Examiner: Will you read it back?

Mr. Benjamin: If a member pays dues and initiation fees in Indiana under your proposed arrangement, would he still have to pay the service fee as a condition of employment?

Mr. Cranefield: May I ask whether you are inquiring whether a member would pay twice? Is that what the question is? The question is not clear to me, and I doubt that it is to the witness.

Trial Examiner: Well, it's not clear to me, but on another point.

You say would he have to pay a service fee as a condition of employment. Now, do you mean under the State law or the National law or the contract or under some other such thing?

Mr. Benjamin: Under this particular proposal that they have made to us, as set forth in General Counsel's Exhibit 2(a).

Mr. Cranefield: I renew my objection; that the proposal speaks for itself. It's in writing.

Trial Examiner: I am going to sustain that objection.

By Mr. Benjamin:

Q. Well, let's assume for a minute that you do have an employee who voluntarily has become a member of the union in Indiana at the present time, and let's assume that he has paid an initiation fee and is paying monthly dues under your constitution. Would your proposal to us require that he also pay the service fee in order to continue his employment with us?

[fol. 92] A. Well, Mr. Examiner, I probably should apologize for introducing a layman's error into this record. I understand by our proposal that we are asking that non-members in Indiana shall pay a financial sum equivalent to the obligation required of those who are members. Specified in our Constitution as far as dues is concerned, specified in our Constitution under the initiation fee, but that being further limited by our contractual understanding with the General Motors Corporation which limits the initiation fee to the constitutional minimum so that General Motors Local Unions in Indiana or elsewhere are not free, despite our constitution, to raise their initation fee beyond the minimum prescribed in the constitution.

I am thinking of in the proposal which I signed, as to asking that all employees pay the same financial obligations.

Trial Examiner: Are you satisfied, or do you want something else?

Mr. Benjamin: Well, there was an outstanding question. I thought Mr. Woodcock interrupted for a minute when he said he wanted to correct an error. Now, is that the answer to the question, too?

The Witness: In my poor fashion, yes, sir.

Mr. Benjamin: All right.

By Mr. Benjamin:

Q. Is there any provision in the Union's constitution which permits any non-member to vote with respect to how the monthly dues which he might pay to the union would be distributed for the various purposes which we have previously enumerated. Namely, an employee's retirement fund or for Solidarity or for strike benefits?

A. No, sir.

Mr. Benjamin: Right at the minute I don't think we have anything else, Mr. Examiner.

Trial Examiner: Mr. Cherpelis? Do you have any further questions?

Mr. Cherpelis: General Counsel has no questions of this witness.

Trial Examiner: Mr. Cranefield?

* * * * * * *

[fol. 93] Re-direct examination.

By Mr. Benjamin:

Q. With reference to General Counsel's Exhibit 2(a), I would like to ask you this question. Is the agency-shop arrangement which you have proposed to General Motors in that letter intended to be the same as the agency shop covered by the decision in the Myade case referred to in the same letter?

Mr. Cranefield: I renew my objection, that the exhibit and the proposal therein contained speaks for itself.

Trial Examiner: I am inclined to agree, Mr. Benjamin.

* * * * * * *

Mr. Benjamin: Your agency shop which you propose to us, is that exactly the same as that agency shop?

Mr. Cranefield: I still think the exhibit speaks for itself.

* * * * * * *

Mr. Cranefield: It was to avoid the possibility of such a decision that our proposal outlined all the essential substantive elements.

* * * * * * *

Mr. Cranefield: We'll sharpen the issue here, Mr. Examiner, in two ways. First, by the fact that our proposal embodies every essential substantive element of an agency-shop agreement, leaving only, as I say, peripheral matters for negotiation; and, secondly, by the focus of the company's refusal to meet, which is upon the single stated ground that they believe such an agreement, if reached, would be in contravention of the National Labor Relations Act.

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[fol. 94] BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM GENERAL COUNSEL'S EXHIBIT 2(b)

Agreement Between General Motors Corporation and the UAW-AFL-CIO

October 2, 1958

* * * * * * *

Recognition

* * * * * * *

3

Union Security and Check-Off of Union Membership Dues

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(4b) Anything herein to the contrary notwithstanding, an employee shall not be

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required to become a member of, or continue membership in, the Union, as a condition of employment, if employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment.

[fol. 95] BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM RESPONDENT'S EXHIBIT 2

Constitution of the International Union United Automobile, Aircraft and Agricultural Implement Workers of America, UAW

Adopted at Atlantic City, N. J. October, 1959

* * * * * * *

44

Article 16

Initiation Fees and Dues

48

Section 12. The International Union shall set aside all sums remitted by Local Unions as Union Strike Insurance Fund dues and the funds resulting shall be a special fund to be known as the International Strike Insurance Fund, to be drawn upon exclusively for the purposes of (1) aiding Local Unions engaged in authorized strikes and in cases of lockouts, and (2) assisting by donations or loans other International Unions and non-affiliated Local Unions similarly engaged, and (3) meeting financial obligations or expenditures which this International Union or its affiliated Local Unions incur as a result of authorized strikes or in [fol. 96] cases of lockouts, and then only by a two-thirds (⅔) vote of the International Executive Board. From the remainder of each member's monthly per capita tax, the International Union shall set aside:

1. Five cents (.05) which shall be expended only for publication of "Solidarity," the official publication of the International Union or of any successor official publication.

2. One cent (.01) to the Fair Practices and Anti-Discrimination Fund to be expended only for the sup-

port and promotion of the programs and activities of the International Union in support of fair employment practices and in opposition to all discriminatory practices in employment.

3. Three cents (.03) as the International Union Education Fund to be expended only for the programs and activities of the International Union Education Department.

4. One cent (.01) as the International Union Recreation Fund which fund shall be apportioned to each region on a per capita basis.

5. Five cents (.05) as the Special Citizenship Fund to be used for the purpose of strengthening democracy by encouraging members and citizens generally to register and vote in community, state and national elections and to carry on organizational and educational programs directed toward the achievement of an ever higher understanding of citizenship responsibility and the need for active participation in the affairs of a free and democratic society.

6. One cent (.01) as the International Union Retired Members Fund, which shall be used only to promote and support programs benefiting retired members, including such programs of the International Union relating to retired members as may be adopted from time to time, and to finance the operation of the International Union Retired Members Department.

[fol. 97] * * * * * * *

67

Article 28

Official Publication

Section 1. There shall be published at least once a month by the International Union a publication designed to educate the membership and to acquaint the membership with the activities of this International Union. Special editions for all, or a particular segment, of the membership shall be printed from time to time as the International Execu-

tive Board may direct. The title of said publication shall be "Solidarity," or its successor designation, Official Publication of the International Union.

* * * * * * *

Section 5. This publication is to be sent through the United States mail to each member in good standing.

Section 6. To non-members, the rate shall be one dollar ($1.00) per annum with postage additional for foreign subscribers.

[fol. 98] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14786

GENERAL MOTORS CORPORATION, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

On Petition for Review and on Cross-Petition for Enforcement of An Order of the National Labor Relations Board

APPENDIX FOR THE NATIONAL LABOR RELATIONS BOARD—Filed March 5, 1962

[File endorsement omitted]

[fol. 99] BEFORE THE NATIONAL LABOR RELATIONS BOARD, SEVENTH REGION

Case No. 7-CA-2560

IN THE MATTER OF GENERAL MOTORS CORPORATION, Respondent and INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW-AFL-CIO, Charging Party

EXCERPTS FROM STENOGRAPHIC TRANSCRIPT OF TESTIMONY AT HEARING OF FEBRUARY 10, 1960

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock a.m.

Before Mr. ALBERT P. WHEATLY, Trial Examiner.

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PROCEEDINGS

* * * * * * *

Cross-examination.

By Mr. CRANEFIELD:

Q. Mr. Woodcock, directing your attention to Article 3 of the Constitution——

Mr. Benjamin. Which one are you referring to?

Mr. Cranefield. The current constitution, Respondent's Exhibit 2, I guess it is.

[fol. 100] By Mr. CRANEFIELD:

Q. Is it your understanding that the effect of that Article of the constitution is that all of the non member employees in the Indiana plants involved in this matter are free to join the union without restriction?

A. [Mr. Woodcock]. Without restriction; yes, sir.

Q. Do you know, Mr. Woodcock, what the practice is—what the uniform practice of the union is—with respect to the disbursement of strike relief assistance to non-members?

A. Who are paying an equivalent financial obligation?

Q. Whether they are or not?

A. If they are not paying anything they are not qualified to participate in strike benefits. If they are, even though they are non-members, they receive the same benefits as members.

Q. If they are paying a sum equivalent to dues they share in the strike benefits on the same footing as a member?

A. Yes, sir.

Q. That is the established practice?

A. Yes, sir. It is.

Mr. Cranefield. I think that's all.

[fol. 101] Before the National Labor Relations Board

General Counsel's Exhibit 2(a)

General Motors Corporation,
General Motors Building,
Detroit 2, Michigan.

Attention: Mr. Louis G. Seaton, Vice President

Gentlemen:

You will recall that at the time we concluded our current National Agreement there was pending in the Indiana courts an appeal from the decision of a trial court of general jurisdiction holding that a union security agreement of the so-called "agency shop" type under which employes were required, if not having voluntarily joined the union, to pay to the union a sum equal to the union's initiation fee and, thereafter, monthly sums equal to the union's regular dues and assessments did not contravene the Indiana Right-To-Work Law enacted in 1957. The case was *Meade Electric Company* v. *Hagberg*.

Having that case in mind we proposed that if the Indiana trial court was affirmed on appeal we would then enter into collective bargaining on our request on a specific proposal of ours for a similar agreement covering em-

ployes represented by us in your five Indiana plants. You indicated that even if there was affirmance on appeal, you would not bargain concerning an agency shop proposal unless you were satisfied that such a form of union security did not violate the National Labor Relations Act as amended.

The *Meade Electric Company* case was affirmed by the Indiana Appellate Court on June 19, 1959. I believe that [fol. 102] an application to the Indiana Supreme Court for review of the decision of the Appellate Court has been denied more recently.

We are advised by our counsel that an agreement generally similiar to that set forth in the *Meade Electric Company* case but omitting the requirement that employes pay sums equivalent to the union's assessments would not be in violation of any provision of the National Labor Relations Act as amended. Accordingly, we request herewith that you appoint a time and place for a meeting with the usual representatives of this organization for the purpose of collective bargaining concerning the exact terms of an agreement supplementary to our existing National Agreement whereby the employes we represent in your Indiana plants (not already members of the union) and new employes hired thereafter should be required as a condition of continued employment after 30 days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay to the UAW a sum equal to the initiation fee charged at each of our local unions involved and monthly sums equal to the regular dues required of our members at each location.

Very truly yours, Leonard Woodcock, Vice President, Director, General Motors Department.

LW: mw
ociu—42

[fol. 103] BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCERTS FROM GENERAL COUNSEL'S EXHIBIT 2(b)

Agreement Between General Motors Corporation and the UAW-AFL-CIO

October 2, 1958

* * * * * * *

RECOGNITION

* * * * * * *

Union Security and Check-Off of Union Membership Dues

(4) An employe who is a member of the Union at the time this Agreement becomes effective shall continue membership in the Union for the duration of this Agreement to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union.

(4a) An employe who is not a member of the Union at the time this Agreement becomes effective shall become a member of the Union within 60 days after the thirtieth (30th) day following the effective date of this Agreement or within 60 days after the thirtieth (30th) day following employment, whichever is later, and shall remain a member of Union, to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union, whenever employed under, and for the duration of, this Agreement.

(4b) Anything herein to the contrary notwithstanding, an employe shall not be required to become a member of, or continue membership in, the Union, as a condition of [fol. 104] employment, if employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment.

(4c) The Union shall accept into membership each employe covered by this Agreement who tenders to the Union the periodic dues and initiation fees uniformly required as

a condition of acquiring or retaining membership in the Union.

* * * * * * *

(4f) "Member of the Union" as used in paragraphs (4) and (4a) above means any employe who is a member of the Union and is not more than sixty (60) days in arrears in the payment of membership dues.

[fol. 105] BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 2(c)

GENERAL MOTORS CORPORATION, Detroit, Michigan
October 27, 1959

International Union, UAW-AFL-CIO,
Solidarity House,
8000 East Jefferson Avenue,
Detroit, Michigan,

Attention: Mr. Leonard Woodcock, Vice President and Director, General Motors Department.

GENTLEMEN:

This is in response to your letter of October 20, 1959 wherein you request that arrangements be made for a meeting with you "for the purpose of collective bargaining concerning the exact terms of an agreement supplementary to our existing National Agreement whereby the employes we represent in your Indiana plants (not already members of the union) and new employes hired thereafter should be required as a condition of continued employment after 30 days following the date of such supplementary agreement or of their initial employment (whichever is later) to pay to the UAW a sum equal to the initiation fee charged at each of our local unions involved and monthly sums equal to the regular dues required of our members at each location."

Stated simply, you are asking us to enter into an agree-

ment with respect to a form of union security which you have characterized elsewhere in your letter as the "agency shop."

We have heretofore on numerous occasions, when you have requested that we enter into an "agency shop" agreement, declined to do so because we were, as we continue [fol. 106] to be, of the view that such an arrangement would violate the National Labor Relations Act, as amended.

The decision of the Indiana Appellate Court in *Meade Electric Company* v. *Hagberg* referred to in your letter does not decide the issue of the legality of an "agency shop" arrangement under the National Labor Relations Act, as amended. Consequently, our consistent view with respect to the legality of the "agency shop" remains unchanged as the result of that decision. This position is not a new one, of course, for as you stated in your letter of October 20, 1959, to us, in commenting upon the *Meade* decision:

> You indicated that even if there was affirmance on appeal, you would not bargain concerning an agency shop proposal unless you were satisfied that such a form of union security did not violate the National Labor Relations Act as amended.

Because we are of the opinion that an "agency shop" arrangement, such as that previously proposed by you and as now detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request for a meeting for the purpose stated in your letter of October 20, 1959.

Very truly yours,

Louis G. Seaton, Vice President.

[fol. 107] BEFORE THE NATIONAL LABOR RELATIONS BOARD

EXCERPTS FROM RESPONDENT'S EXHIBIT 2

Constitution of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW

Adopted at Atlantic City, N.J., October 1959

* * * * * * *

ARTICLE 16. Initiation Fees and Dues.

SECTION 1. The initiation fee, no part of which shall be considered as a Local Union fine, shall be not less than five dollars ($5.00) nor more than fifteen dollars ($15.00) for membership in a Local Union of the International Union excerpt that men and women returning from service in the Armed Forces of the United Nations shall be exempt from payment of an initiation fee upon presentation of military discharge papers to the Local Union Financial Secretary within one (1) year of the date of their discharge. One dollar ($1.00) of each initiation fee shall be forwarded to the International Secretary-Treasurer.

SECTION 2. All dues are payable on or before the first day of the month to the Financial Secretary of the Local Union; provided that where a Local Union, by those procedures provided in Article 47, Section 1, and with International Executive Board approval, establishes a method for periodic payment of total monthly dues in the course of that month, the dues of any member who, in conformance with such periodic arrangement, pays his total monthly dues in the course of the month shall automatically be considered to have been paid on the first day of said month. Commencing with the month of January 1960, Union ad- [fol. 108] ministrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be one dollar and twenty-five cents ($1.25) per month. Minimum monthly membership dues shall be the total of the foregoing sums. Nothing in this Article shall prevent any Local Union or unit of an Amal-

gamated Local Union from establishing, in accordance with the provisions of Article 47, dues in a greater amount than provided for in this Article, and any Local Union, or unit, which at the time when minimum monthly membership dues are increased pursuant to the provisions of this Article, has dues in a greater amount than the minimum monthly membership dues pre-existing the change shall automatically increase its dues by the amount of the change without the necessity of any additional Local Union or unit membership action, and such Local Union dues shall continue until the Local Union's or unit's membership, pursuant to the provisions of Article 47, changes the Local Union's or unit's dues structure. All dues established by this Article shall be uniformly required of all its members by each Local Union or unit of an Amalgamated Local Union except as specific exoneration may be granted pursuant to Section 14 of this Article or Section 12 of Article 13.

SECTION 3. Upon acceptance of the application, membership shall date from the first day of the month for which dues are paid.

SECTION 4. The Local Union shall set aside five cents (.05) of each month's dues payment as a Special Citizenship Fund to be used for the purpose of strengthening democracy by encouraging members, and citizens generally, to register and vote in community, state, and national elections and to carry on organizational and educational pro-
[fol. 109] grams directed toward the achievement of an ever higher understanding of citizenship responsibility and the need for active participation in the affairs of a free and democratic society. Local Unions are obligated to carry out such programs in conjunction with city, county, and state councils. Three cents (.03) of each month's dues payment must be laid aside by the Local Union as a special fund to be used only for educational or recreaational purposes as outlined in Article 26 of this Constitution, provided that two cents (.02) shall be apportioned to recreation. One cent (.01) of each month's dues payment must be set aside by the Local Union as a Retired Members Fund to be used only to promote and support programs benefiting retired members. Local Unions are obligated to carry out this policy in conjunction with community groups where community groups exist for the purpose of promoting and

supporting programs benefiting retired members and other retired workers.

SECTION 5. Every member shall have the privilege of having that portion of his dues which is allocated to the Local and International Citizenship Funds, as provided for in this Article, diverted to a non-partisan citizenship organization. Any monies so diverted will be collected in a separate fund by the International Secretary-Treasurer and, at periodic intervals, turned over to a non-partisan citizenship organization which will be designated by the International Executive Board. Any member may accomplish this diversion by individually notifying the International Secretary-Treasurer by registered mail, and the notification shall be effective for a period of one (1) year from date of request. The diversion may be continued from year to year by additional individual notifications to this effect.

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[fol. 110] SECTION 9. (a) From each member's Union administrative dues, each Local Union must remit a monthly per capita tax on one dollar and seventy-five cents ($1.75) and the Local Union shall retain two dollars ($2.00). In each month, each Local Union must remit the full one dollar and twenty-five cents ($1.25) amount of Union Strike Insurance Fund dues to the International Union which shall be placed in the International Union's Strike Insurance Fund. The member's monthly per capita tax and Strike Insurance Fund dues shall be forwarded to the International Secretary-Treasurer.

(b) One dollar ($1.00) of each reinstatement fee shall be forwarded to the International Secretary-Treasurer.

(c) If the Local Union does not charge back dues for the period following the date of automatic suspension to the date of reinstatement, but imposes a fine based upon the length of such period, the Local Union must forward to the International Union one-half of the fine so collected.

• • • • • • •

SECTION 12. The International Union shall set aside all sums remitted by Local Unions as Union Strike Insurance

Fund dues and the funds resulting shall be a special fund to be known as the International Strike Insurance Fund, to be drawn upon exclusively for the purposes of (1) aiding Local Unions engaged in authorized strikes and in cases of lockouts, and (2) assisting by donations or loans other International Unions and nonaffiliated Local Unions similarly engaged, and (3) meeting financial obligations or expenditures which this International Union or its affiliated Local Unions incur as a result of authorized strikes or in cases of lockouts, and then only by a two-thirds (2/3) vote of the International Executive Board. From the remainder [fol. 111] of each member's monthly per capita tax, the International Union shall set aside:

1. Five cents (.05) which shall be expended only for publication of "Solidarity," the official publication of the International Union or of any successor official publication.

2. One cent (.01) to the Fair Practices and Anti-Discrimination Fund to be expended only for the support and promotion of the programs and activities of the International Union in support of fair employment practices and in opposition to all discriminatory practices in employment.

3. Three cents (.03) as the International Union Education Fund to be expended only for the programs and activities of the International Union Education Department.

4. One cent (.01) as the International Union Recreation Fund which fund shall be apportioned to each region on a per capita basis.

5. Five cents (.05) as the Special Citizenship Fund to be used for the purpose of strengthening democracy by encouraging members and citizens generally to register and vote in community, state and national elections and to carry on organizational and educational programs directed toward the achievement of an ever higher understanding of citizenship responsibility and the need for active participation in the affairs of a free and democratic society.

6. One cent (.01) as the International Union Retired Members Fund, which shall be used only to promote

and support programs benefiting retired members, including such programs of the International Union relating to retired members as may be adopted from time to time, and to finance the operation of the International Union Retired Members Department.

[fol. 112] BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S MOTION FOR RECONSIDERATION AND LEAVE TO FILE BRIEF

Counsel for the General Counsel respectfully moves the Board to reconsider its Decision and Order in this case, issued February 20, 1961 and reported at 130 NLRB No. 54, for the following reasons:

1. The substantial significance and effect of the Board's Decision upon substantive rights and the administration of the Act warrant review and consideration of the questions raised, and not entirely disposed of, by the three separate opinions of Board Members Leedom, Jenkins, and Kimball, which together form the basis for the majority decision in this case.

2. A lack of definition in some of these opinions renders the basis for the majority decision unclear.

3. A defined decision would be uniquely desirable here, in the interest of effective administration and to enable interested parties, not only in right-to-work states but in all the other states as well, to recognize clearly their respective rights under the Act.

4. It is also respectfully requested that the Board grant permission for the filing of a brief by Counsel for the General Counsel in support of this Motion for Reconsideration in order to enable him to specify and develop more fully the above allegations.

Respectfully submitted. Emil Farkas, Counsel for General Counsel, National Labor Relations Board, Region Seven, Industrial Building, 232 W. Grand River, Detroit 26, Michigan.

[fols. 113-114] BEFORE THE NATIONAL LABOR RELATIONS BOARD

CHARGING PARTY'S MOTION FOR RECONSIDERATION AND ORAL ARGUMENT

The International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, respectfully moves the Board to reconsider its Decision and Order of February 20, 1961 (130 NLRB No. 54) and to grant oral argument thereon, for *each* of the following reasons independently and for *all* of the following reasons combined: [1]

I. The three-to-two holding of the Board flouts the clear language and plain intendment of the Labor-Management Relations Act to validate the agency shop.

II. Members Jenkins and Kimball, departing from the clear language and plain intendment of the Act, based their opinions on a patent error of fact.

III. Member Leedom, likewise departing from the clear language and plain intendment of the statute, based his opinion on a demonstrable error of law.

IV. The three opinions jointly constituting the "majority" view of the Board are externally and internally conflicting.

V. The Board's holding is contrary to prior Board decisions.

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[1] This Motion for Reconsideration and Oral Argument is filed pursuant to the direction of the Board allowing time for filing until Wednesday, March 22, 1961.

[fol. 115] IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 29, 1962

Before: CECIL, WEICK, and O'SULLIVAN, Circuit Judges.

This cause is argued by Harry S. Benjamin, Jr. for Petitioner and Melvin J. Welles for respondent and is submitted to the court.

[fol. 116] IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JUDGMENT—June 8, 1962

This cause came on to be heard on the petition to review and set aside the order of the National Labor Relations Board, its request for enforcement of said order and on the transcript of the record, briefs and arguments was submitted to the Court.

On Consideration Whereof, It is now ordered, adjudged and decreed by this Court that said order of the National Labor Relations Board be and the same is hereby set aside and that the Board's request for enforcement be denied.

/s/ Paul C. Weick, United States Circuit Judge.

[fol. 117] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 14786

GENERAL MOTORS CORPORATION, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION for Review of, And to Set Aside, a Final Order of the National Labor Relations Board.

OPINION—Decided June 8, 1962

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

PER CURIAM. The sole question in this case is whether or not an "agency shop arrangement" is lawful under the National Labor Relations Act, as amended, so as to require an employer to bargain with a labor union with respect to including it in a collective bargaining agreement. 29 U.S.C. Sections 151-166, as amended.

The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their initial employment, whichever is later, a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an "agency shop."

The National Agreement which the Union sought to supplement contained provisions creating a "union shop" which required all employees to become members of the [fol. 118] Union within sixty days after the date of the agreement or of their employment and to pay initiation fees

and membership dues uniformly required. These existing provisions with respect to the "union shop" did not apply however to employees "employed in any state which prohibits or otherwise makes unlawful, membership in a labor organization as a condition of employment." A state statute in Indiana known as the Indiana Right to Work Law makes void and unenforceable any agreement conditioning employment upon union membership. Burns' Indiana Statutes Ann. Section 40-2703.

The employer refused to bargain with the Union over this proposal on the ground that any agreement containing such a provision would be in violation of the National Labor Relations Act, as amended.

The Union filed with the National Labor Relations Board a charge of unfair labor practice against the employer which was based upon the refusal of the employer to bargain with respect to this proposal. The Board heard the complaint and issued an order upholding the validity of the "agency shop" and finding that the employer violated Section 8(a) (1) and (5) of the Act by refusing to bargain with the Union with respect to it. The employer has petitioned this Court for review of the order and the Board cross-petitioned for enforcement. The Union was granted leave to file a brief amicus curiae.

The pertinent provisions of the Act are as follows:

Section 7.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3). [29 U.S.C. Sec. 157.]

Section 8(a) (1) and (3)

> It shall be an unfair labor practice for an employer——

[fol. 119] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . PROVIDED FURTHER, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership: [29 U.S.C. Sec. 158 (a) (1) and (3)].

Section 14(b)

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. [29 U.S.C. Section 164(b).]

Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. Sections 401-531.]

Section 3(o)

'Members' or 'member in good standing,' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions [fol. 120] of the constitution and bylaws of such organization. [29 U.S.C. Section 402(o).]

It is the position of the Board that the legislative history of the Act indicated an intent on the part of Congress to authorize union security agreements to eliminate free riders and that the statutory provision permitting union shops is broad enough to include the lesser form of an "agency shop arrangement."

We do not regard the "agency shop arrangement" as being something lesser than a "union shop." We believe it is entirely different. A Union security agreement is premised upon membership in a labor organization. An "agency shop" on the contrary is based upon an employee paying charges in lieu of union membership as a condition of employment.

It is asserted that an "agency shop arrangement" is valid under Indiana law as was held by an intermediate court in that state. *Medde Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E.2d 409. The Supreme Court of Kansas, however, reached a different conclusion in construing the constitution of that state. *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied 368 U.S. 829. The question, however, to be decided in the present case is whether this type of arrangement is lawful under the National Labor Relations Act, as amended.

We think the provisions of the Act are clear and unambiguous and need no judicial construction. The language of Section 7 of the Act which provides "Employees . . . shall also have the right to refrain . . . except to the extent that such right may be affected by *an agreement requiring*

membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)," [29 U.S.C. Section 157.] "means what it says and excerpts from the operation of the law only agreements requiring membership in a labor organization. (italics ours) An employee involuntarily subjected to the "agency shop arrangement," as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this stat- [fol. 121] ute. In our opinion, the provision for an "agency shop" would violate Section 7 and Sections 8(a) (1) and (3) of the Act as this type of arrangement is not excepted from the Act. The employer was therefore not required to bargain with respect to a proposal which was in violation of the Act.

The order of the National Labor Relations Board is set aside and the Board's request for enforcement is denied.

[fol. 122] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 123] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD, Petitioner,

vs.

GENERAL MOTORS CORPORATION

ORDER ALLOWING CERTIORARI—November 19, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL MOTORS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in this case on June 8, 1962.

OPINIONS BELOW

The decision of the court of appeals (Appendix A, *infra*, pp. 21–26) is reported at 303 F. 2d 428. The Board's original decision and order (P.A. 9a–51a) [1] are reported at 130 NLRB 481, and its supplemental decision and order, vacating the original decision, are reported at 133 NLRB No. 21 (P.A. 51a–72a).

[1] "P.A." refers to the appendix to the Company's brief filed in the court of appeals; "B.A." refers to the appendix to the Board's brief. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The opinion and judgment of the court of appeals was entered on June 8, 1962, and a decree was entered on July 3, 1962 (App. A, *infra*, p. 26). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. 160(e).

QUESTION PRESENTED

Whether an "agency shop" arrangement—which leaves union membership optional with the employee but requires that as a condition of continued employment he must nonetheless pay to the union a sum of money equivalent to the initiation fee and periodic dues paid by union members—is a form of union security sanctioned by the proviso to Section 8(a)(3) of the National Labor Relations Act, where such arrangement would be valid under state law.[2]

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix B, *infra* (pp. 27–28).

STATEMENT

I. THE BOARD'S FINDINGS OF FACT

General Motors Corporation (the "Company") is a Delaware corporation engaged in the manufacture of automobiles and related products in Michigan and in other States (P.A. 11a). Its employees are repre-

[2] The Board found that the Company refused to bargain in violation of Section 8(a)(5) of the Act by declining to discuss the Union's agency shop proposal. The propriety of the 8(a)(5) finding turns on the validity of the agency shop proposal.

sented for collective bargaining purposes by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL–CIO (the "Union"), in a single, multi-plant, company-wide unit certified by the Board (P.A. 11a, 55a). The employees involved in this case are employed at the Company's plants and facilities in Indiana (P.A. 55a).

The National Agreement in effect between the Company and the Union provides for maintenance of union membership and a union shop throughout the bargaining unit, under which employees are obligated to acquire and maintain membership in the Union as a condition of continued employment "to the extent of paying an initiation fee and the membership dues uniformly required" by the Union (P.A. 53a; B.A. 50). These provisions do not apply, however, to any employees "employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment" (P.A. 53a; 79a–80a, 94a). The union shop and maintenance-of-membership provisions of the National Agreement have never been made operative in Indiana, where a state statute known as the Indiana Right-to-Work Law[3] renders void and unenforceable any agreement conditioning employment upon union membership (P.A. 54a; 79a–80a). None of the Company's Indiana employees has been required to become or remain a union member, and some do not wish either to

[3] Burns' Ind. Statutes Ann. Sec. 40-2703 (P.S.C. Acts of 1957, Ch. 19, Sec. 3).

become members[4] or to contribute to the Union's financial support (P.A. 76a, 79a).

On June 19, 1959, the Indiana Appellate Court, Second Division, held that an "agency shop" arrangement is valid in the State of Indiana. *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408. The term "agency shop" is used to define a contractual provision under which the employer undertakes to require all employees to contribute financial support to the union by paying a sum equivalent to the regular initiation fees and dues; the employee is not required to join the union and makes the payment upon the ground that the union is his bargaining agent because it is the agent for all the employees in the bargaining unit.

The Union, by letter of October 20, 1959, made a proposal to the Company that a supplement to the existing agreement be negotiated providing for an agency shop agreement "generally similar to that set forth in the *Meade Electric Co.* case," under which the continued employment of all employees at the Company's plants in Indiana would be conditioned upon the payment of sums equal to the initiation fee and the regular monthly dues paid by union members at each location (P.A. 53a–54a; 74a, 81a–82a; B.A. 48–49).

The Union's agency shop proposal specifically contemplated that Union membership would be available to the Indiana employees at their option upon the

[4] The National Agreement makes it mandatory upon the Union to accept into membership every employee who tenders the requisite initiation fees and dues (P.A. 59a; B.A. 51).

tender of sums equivalent to the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining such membership (P.A. 59a–60a). Those employees who elected to join the Union were to accede to all the benefits, burdens and other incidents of membership on a nondiscriminatory basis (P.A. 59a). Those employees who chose not to join the Union were to be carried upon the Union's rolls as paying non-members and extended the right, under the Union's Constitution, to participate equally with members in the benefits flowing from the Union's use of such moneys for strike benefits, educational and retired members benefits, union publications, and the like (P.A. 60a; 87a–90a, 95a–97a). As non-members, however, such employees were not to share in the other benefits or the burdens of membership, and were to have neither the duty nor the right to attend union meetings, to vote upon the ratification of agreements negotiated by the Union, or to participate in the Union's intra-organizational affairs (P.A. 86a, 92a).

As explained by Leonard Woodcock, the Union's vice-president and director of the General Motors Department, under the Union's proposal employees required to pay the amount of the initiation fee and of the monthly dues would be "entitled to the same benefits as a member unless they themselves choose not to make them available to them" (P.A. 60a; 90a, 86a). According to Woodcock, the Union's Constitution, although written in the sense of membership, has been construed in practice to extend to non-members under agency shops the right to receive the benefits previously enumerated (P.A. 60a; 90a; B.A. 55–58).

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The Company, by letter of October 27, 1959, declined to comply with the Union's request on the ground that an "agency shop arrangement * * * as * * * detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement" (P.A. 54a, 75a; B.A. 52–53).

Following the Company's refusal to bargain concerning the Union's request, the Union filed a charge that the Company had committed the unfair labor practice of refusing to bargain collectively in violation of Sections 8(a) (5) and (1) of the National Labor Relations Act. A complaint issued; a hearing was held before a trial examiner;[1] and the case was then transferred directly to the Board.

II. THE BOARD'S CONCLUSIONS AND ORDER

The Board (one member dissenting) concluded that the Company's admitted refusal to bargain concerning the Union's agency shop proposal violated Sections 8(a)(5) and (1) of the Act. In the Board's view,

[1] The Company, in its answer to the complaint, admitted the Union's demand for bargaining and the Company's refusal to comply, but denied having committed an unfair labor practice (P.A. 7a–8a). At the hearing upon the complaint, the parties, after stipulating to the facts and taking the testimony of Vice President Woodcock of the Union waived further proceedings before the Trial Examiner, and the case was transferred directly to the Board. In its original decision and order, the Board (with two members dissenting) concluded that no unfair labor practice had been committed, and directed dismissal of the complaint (P.A. 9a–51a). The General Counsel and the Union filed motions for reconsideration (B.A. 59, 60); the Board granted the motions, vacated its previous decision and order, and issued the decision discussed above.

the Union's proposal "concerning a clause which would leave the final decision as to membership or non-membership with each individual employee, *at his option*, but * * * condition employment upon the payment of sums of money which would constitute each employee's share of financial support * * * fully comport[ed] with the Congressional intention in Section 8(a)(3) for the allowance of union security contracts, and, therefore, [was] a mandatory subject" for bargaining (P.A. 64a–65a). The Board further found that "neither Section 14(b), relating to the withdrawal of the Federal Act where State law prohibits the 'execution or application of agreements requiring membership in a labor organization as a condition of employment,' nor * * * the 'right-to-work' statute of Indiana" militated against that conclusion (P.A. 58a).

The Board's order directs the Company to cease and desist from the violation found and from any like or related conduct. Affirmatively, the order requires the Company to bargain with the Union, upon request, concerning the Union's agency shop proposal or any like or related proposal, and to embody any understanding reached in a signed agreement (P.A. 66a–68a).

III. THE DECISION OF THE COURT OF APPEALS

The court of appeals set aside the Board's order (App. A, *infra*, pp. 21–26). The court concluded that the language in Section 7 of the Act, which gives employees the right to refrain from union activities "except to the extent that such right may be affected

by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)," excepts "from the operation of the law only agreements requiring membership in a labor organization." This does not privilege an agency shop because, "An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute." (App. A, *infra*, pp. 25–26.)

REASONS FOR GRANTING THE WRIT

1. The decision below casts doubt upon a form of collective bargaining agreement that has been gaining increasing acceptance as a solution to one of the most troublesome issues in collective bargaining—the extent to which membership and/or financial support of the collective bargaining representative should be a condition of employment in the shop. A decision by this Court putting the issue to rest would therefore be an important contribution to the development of sound labor-management relations and to the continuance of uninterrupted production in at least one industry of vital national concern.

Moreover, estimates based on random sampling indicate that the agency shop is now written into six percent of all collective bargaining agreements, either alone or in conjunction with the familiar

union shop.[6] In the steel industry, for example, the agency shop is embodied in contracts which cover the employment of more than 100,000 employees.

The obduracy of disputes in many industries resulting from a union's demand for the security granted by a closed or union shop agreement, and an employer's unwillingness to compel any of his employees to join an organization as a condition of employment, is too familiar to relate. The agency shop provides a solution which at least partially meets the needs of both parties. The union is guaranteed the financial support required to carry on collective bargaining and to process grievances for the benefit of all the employees in the bargaining unit. The employer is relieved from what he may consider the distasteful duty of disregarding the right of freedom of association or non-association by compelling men to become members of an organization they are unwilling to join. Perhaps the most dramatic illustration of the practicability of this solution is the settlement providing for the agency shop recently negotiated between Douglas Aircraft Co. and the International Associ-

[6] It has been estimated, on the basis of a random sampling of 400 contracts drawn from some 5,000 agreements currently in effect, that union security provisions exist in 76 percent of all contracts. Full union shop provisions requiring union membership of all employees are found in 55 percent of all contracts. The modified union shop in its many variations occurs in approximately 13 percent of all contracts; maintenance-of-membership provisions constitute 5 percent of this total, and the agency shop, either in conjunction with the union shop or as the sole form of union security, 6 percent. Bureau of National Affairs, *Collective Bargaining Negotiations and Contracts*, vol. 2, Sec. 87: 1-2. See also, 82 Monthly Lab. Rev. 1340, 1352.

ation of Machinists and United Automobile Workers of America, applicable to employees engaged in the production of missiles for space exploration and national defense, in which the agency shop was adopted as a compromise solution to the union security issue. We are informed that the decision below has created a formidable obstacle to the solution of other disputes involving the union security issue in the missile industry. A special panel appointed by the President is currently attempting to resolve these controversies, which directly affect about 100,000 employees of Lockheed Aircraft Co., North American Aviation, Inc., Convair division of General Dynamics Corp., Aerojet-General Corp., and Ryan Aeronautical Corp.[9a] It is to be hoped that these controversies will be peacefully resolved before this case could be decided, but the importance of the issue in these disputes illustrates its significance in labor-management relations. Furthermore, it is not unlikely that settlements might follow the precedent of the Douglas Aircraft agreement, thus keeping the legal issue alive even in the immediate context.

For the decision below confronts the parties to an existing agency shop agreement with a difficult dilemma. If the employer refuses any longer to enforce the agreement he may be liable to the union for substantial damages for breach of contract if other courts, contrary to the court below, agree with the Board that this form of union security is permissible under Section 8(a)(3). On the other hand, if the employer and the union continue to enforce an

[9a] See 50 LRR 237–238, 283–284.

agency shop clause, both may be exposed to unfair labor practice charges and to liability for large sums of back pay and the refund of dues to numerous employees. Only a decision by this Court can put the question to rest.

The question is now ripe for decision. The issue is squarely raised by the order of the court below setting aside the decision of the National Labor Relations Board. Further litigation before the Board or in other circuits would not contribute to the development of the law on this aspect of labor-management relations.

2. The holding of the court below is contrary to principles which the Board and the courts have consistently applied in interpreting the union security proviso to Section 8(a)(3).

The proviso in the Wagner Act permitted closed shop agreements. From the beginning, the Board took the position that this merely set the maximum limits of permissible union security, and that it thus encompassed and privileged any lesser form of union security as well.[1] The Taft-Hartley amendments

[1] See, *e.g.*, *Public Service Company of Colorado*, 89 NLRB 418, 419, 420–424 (support money and maintenance-of-membership provisions under which all employees were required, as a condition of employment, to pay a specified monthly sum for the support of the bargaining unit and members of the union were also required to maintain their membership); *National Electrict Products Corp.*, 3 NLRB 475, 506, 507 (contract requiring membership or, in the alternative, deduction of dues); *Waterman Steamship Corp.*, 7 NLRB 237, 243, modified, 103 F. 2d 157 (C.A. 5), modification reversed, 309 U.S. 206 (preferential hiring contract giving members "preference of employment" but requiring such preference only "as vacancies occur" and not requiring the discharge of employees who refuse to join); see also, *Isthmian Steamship Co.*, 22 NLRB 689, 699, enforced as modified, 126

banned the closed shop, but permitted the union shop. Thus, Congress in the 1947 Taft-Hartley amendments to the Act retained the language of the original proviso to Section 8(a)(3) that—

> nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein

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F. 2d 598 (C.A. 2); *Pilot Radio Corp.*, 14 NLRB 1084, 1104–1105; *Peninsular & Occidental Steamship Co.*, 5 NLRB 959, 967, 968, set aside, 98 F. 2d 411 (C.A. 5), certiorari denied, 305 U.S. 653; *M. & J. Tracy*, 12 NLRB 916, 932–934 (preferential employment contract giving members of contracting union preference for all work); see also, *J. E. Pearce Contracting & Stevedoring Co., Inc.*, 20 NLRB 1061, 1070–1073; *Phelps-Dodge Copper Products Corp.*, 63 NLRB 686 (maintenance of membership); see also, *Eureka Vacuum Cleaner Co.*, 69 NLRB 878; *The Cliffs Dow Chemical Co.*, 64 NLRB 1419; Opinion of Robert B. Watts, NLRB General Counsel, *Opinion On Legality of Union Maintenance Clauses*, 10 LRRM 1294; *Matter of Mill B., Inc.*, 40 NLRB 346, 348 (maintenance-of-membership and union shop contract; any employee failing to maintain membership or to make application for membership, or whose application for membership is rejected, to be discharged upon written notice to the employer); see also, *Diamond T Motor Car Co.*, 64 NLRB 1225 (union shop); *Electric Vacuum Cleaner Co.*, 18 NLRB 591, 613–614, set aside, 120 F. 2d 611 (C.A. 6), reversed, 315 U.S. 685 (modified union shop; contract requiring new employees after a work probation period to join the contracting union, but leaving old employees free to join rival union, to decline to join or to drop their membership in the contracting union, or to urge new employees to change union affiliation). See also *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (maintenance-of-membership provision); *American Seating Co.*, 98 NLRB 800 (religious objectors who did not become union members paid sums equivalent to union dues).

but added:

> on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *

There is nothing in this amendment which indicates that Congress intended to outlaw any lesser type of union security arrangement, or to upset the prior Board view that the proviso merely specified the maximum form of union security arrangement permitted under federal law and thus privileged all less restrictive forms as well.

There can be no doubt that the usual agency shop arrangement, such as the one here contemplated, is less restrictive of the employee's freedom of choice than is a union shop provision. Under the union shop, the employee is given a choice between joining the union or losing his job. These alternatives are also open to him under the proposed agency shop. In addition, however, he has the further option to refrain from union membership but pay the union a sum equivalent to dues and initiation fees. It seems wholly unreasonable to hold, as did the court below, that Congress intended to sanction agreements presenting the employee with an ultimatum to join the union or be discharged, while prohibiting union security arrangements which allow him a wider range of choice. There is nothing to the contrary in *Labor Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 695, for, although the Court said that the "words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer

activity in union organization," it was drawing a distinction between uncanalized employer interference with freedom of choice prior to the execution of a closed shop contract in contrast to the privilege of requiring union membership as a condition of employment after such a contract had been executed.

The legislative history of the Taft-Hartley amendments supports this analysis. It clearly shows that Congress desired to remedy the most serious abuses of compulsory unionism, which existed under the closed shop, but, at the same time, to permit the union and employer to agree to an arrangement which would require all employees to share the cost of bargaining, thus eliminating "free riders." See S. Rep. No. 105, 80th Cong., 1st Sess., 6–7, 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), 412–413.[8] That Congress had in mind agency shop arrangements, as well as the more conventional arrangement whereby dues and fees are paid to the union as an incident of union membership, is demonstrated by its awareness of, and reliance on, the 1946 arbitration decision of Justice Rand of the Canada Supreme Court, establishing a model union security formula for the United Auto Workers and the Ford Motor Company of Canada. In that landmark decision, Justice Rand denied the UAW's request for a full union shop, but permitted regular checkoff of an amount equivalent to union dues from the wages of all employees, including non-members of the union. 1 Lab. Arb. Rep. 439, 17 LRRM 2782. Analogizing the Taft-Hartley union security provisions to the

[8] See also, 93 Cong. Rec. 3837, 2 Leg. Hist. 1010.

"Rand formula," Senator Taft stated (93 Cong. Rec. 4887, 2 Leg. Hist. of the Labor Management Relations Act, 1947, 1421–1422):

> the rule adopted by the [Conference] committee is substantially the rule now in effect in Canada * * *. [T]he present rule in Canada is that * * * an employee * * * must * * * pay dues, even though he does not join the union * * *. If he pays the dues without joining the union, he has the right to be employed.' * * *

The differences between the type of union shop which is admittedly authorized by Section 8(a)(3) and the agency shop are minor and insignificant in terms of the policies of the National Labor Relations Act. The dominant purpose of the first proviso to that section was to permit unions and employers by mutual agreement to require all the employees in a bargaining unit to contribute financial support to the bargaining agent. This is the purpose and only consequence of an agency shop.

The second proviso to Section 8(a)(3) prevents using a union shop clause for the purpose of putting

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[9] In one essential respect, Senator Taft did distinguish between the Canadian rule and the committee amendments. He felt that because the Rand formula had been imposed upon the parties by law, and was not voluntarily agreed to, it amounted to "a kind of tax, if you please, for union support," and he therefore considered that "there is no constitutional way by which we can do that in the United States" (93 Cong. Rec. 4887, 2 Leg. Hist. 1422). Whether or not this view was correct, Senator Taft clearly did not regard the agency shop itself as an unconstitutional form of union security when freely entered into by the parties, nor did he suggest that it was otherwise unlawful under the Conference bill.

other forms of pressure upon employees. Its effect is to prohibit the employer from discharging an employee for failure to belong to a labor organization—

> * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employer to render the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

In *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 40–41, this Court stated:

> The policy of the Act is to insulate employees' jobs from their organizational rights. * * * The only limitation Congress has chosen to impose * * * is specified in the proviso to § 8(a)(3) which authorizes employers to enter into certain union security contracts * * *. [*The*] *legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e.,* employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, *and gave the unions the power to contract to meet that problem* while withholding from unions the power to cause the discharge of employees for any other reason. * * * [Emphasis added.]

Accordingly, in *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, certiorari denied, 342 U.S. 815, the Seventh Circuit affirmed the Board's holding that, under the above

proviso to Section 8(a)(3), "employees who request union membership and tender initiation fees and dues, but fail to comply with other union-imposed conditions for acquisition of membership, are protected by the Act from discharge under the terms of a valid union security agreement" (*id.* at 1010).[10] The court found "that [the Board's] interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees" (*id.* at 1012). Similarly, the courts have repeatedly affirmed Board holdings that the loss of membership in good standing occasioned by factors other than a failure to pay initiation fees and periodic dues—*e.g.*, nonpayment of fines and assessments,[11] refusals to participate in union activities such as picketing,[12] participation in dual union ac-

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[10] The employees had declined, for religious reasons, to take the oath which the union required as a condition of membership.

[11] *National Labor Relations Board* v. *Food Fair Stores*, (C.A. 3), August 8, 1962, 50 LRRM 2913; *National Automotive Fibres, Inc.*, 121 NLRB 1358, enforced as modified, 277 F. 2d 779 (C.A. 9); *Injection Molding Co.*, 104 NLRB 639, 645, enforced as modified, 211 F. 2d 59 (C.A. 8); *Peerless Tool & Engineering Co.*, 111 NLRB 853, enforced, 231 F. 2d 298 (C.A. 7), certiorari denied, 352 U.S. 833.

[12] *Eclipse Lumber Co.*, 95 NLRB 464, enforced, 199 F. 2d 684 (C.A. 9); *Waterfront Employers of Washington*, 98 NLRB 284, 318, 320, enforced, 211 F. 2d 946, 950 (C.A. 9); *Local 450, International Union of Operating Engineers*, 122 NLRB 564, 567, enforced as modified, 281 F. 2d 313, 316 (C.A. 5), certiorari denied, 366 U.S. 909.

tivities,[13] and noncompliance in other respects with a union's internal rules of membership[14]—will not support a discharge even though based upon a valid compulsory membership contract.

These decisions clearly show that, under the union security proviso of 8(a)(3), the only incident of union membership which is enforceable as a condition of employment is the payment of initiation fees and periodic dues. This is also the only obligation imposed as a condition of employment by the agency shop. Thus the same limited statutory policy—barring "free riders" by permitting the costs of collective bargaining to be allocated among all the employees who benefit from it, members and nonmembers alike—is just as well served by the agency shop arrangement here contemplated as by the more conventional arrangement requiring full-fledged union membership. Conversely, the type of agency shop involved in this case, which permits any employee to become a member of the union, has no consequences not also incident to a permissive union shop arrangement.

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[13] *Local 815, International Brotherhood of Teamsters*, 127 NLRB 993, enforced, 290 F. 2d 99 (C.A. 2); *Pape Broadcasting Co.*, 104 NLRB 29, enforced as modified, 217 F. 2d 197 (C.A. 5); *Utley Co.*, 108 NLRB 295, enforced, 217 F. 2d 885 (C.A. 6); *Mechanics Educational Society of America*, 109 NLRB 838, enforced, 222 F. 2d 429 (C.A. 6).

[14] *Philadelphia Iron Works*, 103 NLRB 596, enforced, 211 F. 2d 937 (C.A. 3); *Local 803, International Brotherhood of Boilermakers*, 107 NLRB 1011, enforced, 218 F. 2d 299 (C.A. 3); *Electric Auto-Lite Co.*, 92 NLRB 1073, enforced, 196 F. 2d 500 (C.A. 6), certiorari denied, 344 U.S. 823; cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 30–32.

3. It should be observed that the decision below appears to conflict in principle with recent State court decisions holding State right-to-work laws, drafted only in terms of "membership," outlaw the agency shop. See *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, certiorari denied, 368 U.S. 829; *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, 50 LRRM 2055, pending on petition for certiorari, No. 368, this Term.[15] Those cases proceed on the assumption that the agency shop constitutes an agreement "requiring membership in a labor organization as a condition of employment," within the meaning of Section 14(b) of the Act.[16]

[15] See also, *Motor Coach Employees* v. *Stage Line, Inc.*, D.C. Nev. 1961, 49 LRRM 2732, where the federal district court held that the Nevada right-to-work law, written only in terms of "membership," proscribes agency shop agreements. And see *Arizona Flame Restaurant, Inc.* v. *Baldwin*, Ariz., 1954, 26 LA par. 68,647, where an Arizona trial court reached the same conclusion under Arizona's right-to-work law. On appeal, however, the Arizona Supreme Court did not rule on this issue. *Baldwin* v. *Arizona Flame Restaurant, Inc.*, 82 Ariz. 385, 313 P. 2d 759.

Nineteen states have enacted right-to-work laws, and ten of these have passed upon the legality of the agency shop: Indiana courts are the only ones which have upheld agency shop arrangements. 3 CCH STATE LAWS, par. 49,507. See also, *The Agency Shop: A Lawful Form of Union Security?* 57 N.W. U.L. Rev. 75, 86–88 (1962).

[16] Section 14(b) of the Act provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1962.

APPENDIX A

United States Court of Appeals
for the Sixth Circuit

No. 14786

GENERAL MOTORS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION for Review of, And to Set Aside, a Final Order of the National Labor Relations Board.

Decided June 8, 1962.

Before: CECIL, WEICK and O'SULLIVAN, Circuit Judges.

PER CURIAM. The sole question in this case is whether or not an "agency shop arrangement" is lawful under the National Labor Relations Act, as amended, so as to require an employer to bargain with a labor union with respect to including it in a collective bargaining agreement. 29 U.S.C. Sections 151–166, as amended.

The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already

members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their initial employment, whichever is later, a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an "agency shop."

The National Agreement which the Union sought to supplement contained provisions creating a "union shop" which required all employees to become members of the Union within sixty days after the date of the agreement or of their employment and to pay initiation fees and membership dues uniformly required. These existing provisions with respect to the "union shop" did not apply however to employees "employed in any state which prohibits or otherwise makes unlawful, membership in a labor organization as a condition of employment." A state statute in Indiana known as the Indiana Right to Work Law makes void and unenforceable any agreement conditioning employment upon union membership. Burns' Indiana Statutes Ann. Section 40-2703.

The employer refused to bargain with the Union over this proposal on the ground that any agreement containing such a provision would be in violation of the National Labor Relations Act, as amended.

The Union filed with the National Labor Relations Board a charge of unfair labor practice against the employer which was based upon the refusal of the employer to bargain with respect to this proposal. The Board heard the complaint and issued an order upholding the validity of the "agency shop" and finding that the employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain with the

Union with respect to it. The employer has petitioned this Court for review of the order and the Board cross-petitioned for enforcement. The Union was granted leave to file a brief amicus curiae.

The pertinent provisions of the Act are as follows:

> SECTION 7.
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3). [29 U.S.C. Sec. 157.]

Section 8(a) (1) and (3).

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: PROVIDED, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * PROVIDED FURTHER, That no employer shall justify any discrimination

against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; [29 U.S.C. Sec. 158(a) (1) and (3)].

Section 14(b).

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. [29 U.S.C. Section 164(b).]

Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. Sections 401–531.]

Section 3(o).

"Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization. [29 U.S.C. Section 492(o).]

It is the position of the Board that the legislative history of the Act indicated an intent on the part of Congress to authorize union security agreements to eliminate free riders and that the statutory provision permitting union shops is broad enough to include the lesser form of an "agency shop arrangement."

We do not regard the "agency shop arrangement" as being something lesser that a "union shop." We believe it is entirely different. A Union security agreement is premised upon membership in a labor organization. An "agency shop" on the contrary is based upon an employee paying charges in lieu of union membership as a condition of employment.

It is asserted that an "agency shop arrangement" is valid under Indiana law as was held by an intermediate court in that state. *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 409. The Supreme Court of Kansas, however, reached a different conclusion in construing the constitution of that state. *Higgins* v. *Cardinal Manufacturing Co.*, 188 Kan. 11, 360 P. 2d 456, cert. denied 368 U.S. 829. The question, however, to be decided in the present case is whether this type of arrangement is lawful under the National Labor Relations Act, as amended.

We think the provisions of the Act are clear and unambiguous and need no judicial construction. The language of Section 7 of the Act which provides "employees * * * shall also have the right to refrain * * * except to the extent that such right may be affected by *an agreement requiring membership in a labor organization as a condition of employment* as authorized in Section 8(a)(3)." [29 U.S.C. Section 157.] "means what it says and excepts from the operation of the law only agreements requiring membership in a labor organization. (italics ours) An employee involuntarily subjected to the "agency shop arrangement," as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a

condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute. In our opinion, the provision for an "agency shop" would violate Section 7 and Sections 8(a) (1) and (3) of the Act as this type of arrangement is not excepted from the Act. The employer was therefore not required to bargain with respect to a proposal which was in violation of the Act.

The order of the National Labor Relations Board is set aside and the Board's request for enforcement is denied.

JUDGMENT

June 8, 1962

This cause came on to be heard on the petition to review and set aside the order of the National Labor Relations Board, its request for enforcement of said order and on the transcript of the record, briefs and arguments was submitted to the Court.

On Consideration Whereof, It is now ordered, adjudged and decreed by this Court that said order of the National Labor Relations Board be and the same is hereby set aside and that the Board's request for enforcement be denied.

(S) PAUL C. WEICK,
United States Circuit Judge.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, which-

ever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * * *

SEC. 14. * * * (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in this case in support of the petition for certiorari, as provided for in Rule 42 of the Rules of this Court. The consent of the Solicitor General has been obtained. Counsel for General Motors Corporation has declined either to grant or refuse consent.[1]

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[1] The Solicitor General's letter and the correspondence between counsel for the AFL-CIO and counsel for General Motors Corporation has been filed with the Clerk.

In a letter dated August 13, 1962, counsel for General Motors stated:

"When and if a petition for certiorari is filed by the Solicitor General, we will be in a position, after having seen the same, to advise you as to whether we will consent to your possible filing of a brief *amicus curiae*. Obviously, we are in no

We are aware that motions of this sort "are not favored." (Rule 42.1). However, our inability to secure from counsel for respondent a timely and unequivocal answer to our request for consent, and the great importance to the AFL-CIO of the question this case presents, leaves us no alternative.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of national and international unions, including the United Automobile Workers which is the charging party in this case. The total membership of the unions affiliated with the AFL-CIO is approximately thirteen million.

The court below held that the agency shop is illegal under the National Labor Relations Act.

This ruling is of great importance to the unions comprising the AFL-CIO and their members because, as developed in the attached brief at pp. 4-9, approximately 6 percent of all collective bargaining agreements, covering several hundred thousand workers, contain agency shop provisions. These provisions were negotiated in reliance upon NLRB decisions dating back to 1950 sustaining the validity of the agency shop.

The ruling is likewise of great importance in that it impedes industrial peace by outlawing an intermediate form of union security which has played a useful role as a compromise solution in disputes over union security. As this motion goes to press the decision below is actually hampering settlement on the basis of the agency shop of

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position to grant consent at this time without having some idea as to what the position of the Solicitor General may be should he finally decide to file a petition for certiorari."

In reply counsel for the AFL-CIO endeavored to explain that the Rules and practice of the Court require that a brief *amicus* in support of a petition be filed at the same time as the petition. (Letter of August 17, 1962.) However, counsel for General Motors merely reiterated his position as quoted above. (Letter of August 20, 1962.)

disputes over union security between the United Automobile Workers, AFL-CIO, the International Association of Machinists, AFL-CIO, and employers in the aerospace industry.[2] Approximately 100,000 workers are involved, and the disputes are of such importance to national security that the President has appointed a special Commission to handle them. While these particular disputes will no doubt be finally disposed of prior to any ruling by this court on the legality of the agency shop, the disruptive effect the decision below has had upon these negotiations may be expected to recur in other disputes.

ISSUES NOT COVERED IN THE PETITION

The attached brief *amicus* in support of the petition for certiorari deals fully with two subjects which, we believe, will be covered only summarily in the government's petition for certiorari. On one of these points our interest, and our evaluation of the legal issues, differs substantially, we believe, from those of the government.

1. The pragmatic importance of the agency shop from the standpoint of the prevalence of agency shop provisions and the utility of the agency shop as a compromise solution of industrial disputes are fully developed in the attached brief. We expect that these matters will be dealt with much more summarily in the government's petition. The data set forth in the attached brief on pp. 7-8 were secured by our research department from affiliated unions, and will not be included in the government's petition.

2. As developed at pp. 19-22 of the attached brief, one of the problems raised by the holding below, that the agency shop is invalid as a matter of federal law, is the interrelationship between that decision and state court decisions upholding the power of the States to ban the agency shop

[2] See brief, pp. 10-11.

under § 14(b) of the National Labor Relations Act. One of these state court decisions, *Schermerhorn* v. *Retail Clerks*, 141 So. 2d 269, 48 LRRM 3119 (Fla. 1961), is before the Court on petition for certiorari, No. 368, this Term. While we recognize that there is a conflict in principle between the decision below and the rationale of these state court decisions, we think that it is arguable (see brief pp. 21-22) that both the court below and the state courts are in error, and that while the agency shop is valid under the federal Act the States are not authorized to ban it by § 14(b). We therefore urge (brief p. 22) that, in view of the interrelationship between the issues presented in this case and in *Schermerhorn*, and of their difficulty and importance, the Court consider the petitions in the two cases together, and that it grant both.

The government, on the other hand, is concerned only, or at least primarily, with the validity of the agency shop as a matter of federal law, and we therefore anticipate that its petition will develop much less fully than we do in the attached brief the relationship between this case and the *Schermerhorn* case, No. 368.

Respectfully submitted,

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September 6, 1962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

GENERAL MOTORS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the Motion for Leave to File a Brief as Amicus Curiae.

STATUTES INVOLVED

The statutory provisions involved are Section 8(a)(3), 8(a)(5), 8(b)(2) and 14(b) of the National Labor Relations Act, as amended. These provisions are:

"UNFAIR LABOR PRACTICES

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retraining membership."

"LIMITATIONS.

"Sec. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that an agency shop is illegal under the National Labor Relations Act. This ruling casts doubt upon the validity of numerous agreements negotiated over the years in reliance upon established NLRB doctrine; and it jeopardizes the status of a form of union security which has played a useful role as a compromise solution for disputes over union security. The decision below is likewise important from the standpoint of the administration of justice in that it overturns, without reason or reasoning, a long-standing and sensible administrative interpretation of the Act in favor of a newly-improvised and practically undesirable interpretation. Finally, the decision below conflicts in principle with *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, 47 LRRM 2782 (1961), *cert. denied sub nom. Local 498, Teamsters Union* v. *Hig-*

gins, 368 U.S. 829, and *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, 48 LRRM 3119 (Fla. 1961), pending on petition for certiorari, No. 368, this Term.

1. The Board upheld the legality of the agency shop in *Public Service Company of Colorado*, 89 NLRB 418 (1950), decided under the Wagner Act, and in *American Seating Company*, 98 NLRB 800 (1952), decided under the Taft-Hartley Act. Relying upon these decisions, the Federal Mediation and Conciliation Service has distributed a report on the agency shop for the use of its staff which not only sets forth various forms of agency shop clauses, but asserts the legality of these clauses. The report states (p. 25):

> "Before the enactment of the Labor Management Relations Act, 1947, unions frequently demanded the closed shop which required union membership prior to hiring. Since Section 8(a)(3) of that Statute's amendments to the National Labor Relations Act outlawed the closed shop in usual circumstances so far as businesses subject to the NLRA are concerned, unions now often demand either the union shop or maintenance of membership, and sometimes demand an agency shop, *all of which are permissible in restricted form under the amended National Labor Relations Act.* (Emphasis added.)[3]

In a footnote the report cites the Board's decisions in *American Seating Company* and *Public Service Company of Colorado*.

In the years since these decisions agency shop clauses have been included in numerous collective bargaining agreements. A study made by the United States Department of Labor, Bureau of Labor Statistics, of union security provisions in major collective bargaining agreements (i.e., those governing more than 1,000 employees) during the

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[3] Federal Mediation Service, The Agency Shop (1959).

years 1958-59 disclosed agency shop clauses in the following agreements:

Company and location	*Union*	*Number of employees*
Modified union shop and agency shop		
Kelly-Springfield Company Cumberland, Maryland	Rubber Workers	1,750
American Seating Company Grand Rapids, Michigan	Auto Workers	1,200
The Bunker Hill Company Kellogg, Idaho	Mine, Mill and Smelter Workers (Ind.)	2,000
Membership maintenance and agency shop		
Hershey Chocolate Corp. Hershey, Pennsylvania	American Bakery and Confectionery Workers (AFL-CIO)	3,000
Campbell Soup Company Chicago, Illinois	Retail, Wholesale	3,450
Corn Products Refining Company Illinois, Missouri and Texas (consistent with Federal and State laws)	Oil, Chemical and Atomic	4,400
Wisconsin Motor Corp. Milwaukee, Wisconsin	Auto Workers	1,450

Company and location	*Union*	*Number of employees*
American Cable and Radio Corp. New York-Washington, D. C. San Francisco-Honolulu	Communications Workers of America	1,350
Western Union Telegraph Co. (Interstate)	Commercial Telegraphers	30,000
Ohio Edison Co. Akron, Ohio	Utility Workers (6 locals)	1,550
Public Service Company of Colo. Denver, Colorado	International Brotherhood of Electrical Workers	1,800
Sole bargaining and agency shop		
Utah Power and Light Co. Utah, Idaho, and Wyoming	International Brotherhood of Electrical Workers	1,350
Dayton Power and Light Company Dayton, Ohio	Utility Workers	1,850
Government Services, Inc. Washington, D. C. (cafeteria agreement)	United Cafeteria and Restaurant Workers (Ind.)	1,500
Pacific Maritime Association	International Longeshoremen's and Warehousmen's Union (Ind.)	15,000

A survey by the Bureau of National Affairs of 400 representative contracts in effect as of mid-1960 disclosed that "agency-shop clauses are now included in 6 percent of contracts, up from 1 percent in 1957." (46 LRRM 14, 18.)

It is probable that a current survey would reveal a continuing increase in the use of agency shop clauses, particularly in Indiana since the *Meade Electric Company* decision.[4] Counsel has made inquiry of several unions, with the following results:

(1) The United Steelworkers of America, AFL-CIO, reported that it has outstanding 164 collective bargaining agreements containing agency shop clauses. These clauses, applicable only in States having right-to-work laws, cover a total of 111,198 employees. Seventy-seven of these contracts, covering 34,146 employees, cover only plants in Indiana. In addition another 43,294 employees in Indiana are covered by agency shop clauses in company-wide agreements. Thus a total of 77,740 employees in Indiana are covered by agency shop clauses negotiated by the Steelworkers Union.

(2) The International Brotherhood of Electrical Workers, AFL-CIO surveyed only collective bargaining contracts covering units in Indiana and Florida. It reported that the following agreements contain agency shop clauses:

Company and location	*Number of employees*
Anaconda Wire & Cable (Marion, Ind.)	700
Arwin Industry (Columbus, Ind.)	900
Avco Corp. (Richmond, Ind.)	1,200

[4] *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408 (1959) held that the Indiana right-to-work law does not ban the agency shop.

Company and location	*Union*	*Number of employees*
Columbus Process Co. (Columbus, Ind.)		400
Delta Switchboard (Marion, Ind.)		200
Essex Wire (Marion, Ind.)		1,100
Wagner Industry (So. Bend-Wabash, Ind.)		about 200 to 300
National Record Press Co. (Richmond, Ind.)		400
International Resisters (St. Petersburg, Fla.)		400

(3) The International Union of Electrical, Radio and Machine Workers, AFL-CIO, surveyed only collective bargaining contracts covering units in Indiana. It reported that the following agreements contain agency shop clauses:

Company and location	*Number of employees*
Franklin Manufacturing Co., Brookville	125
National Metal Products Co., Connersville	275
Rex Manufacturing Co., Connersville	1,750
International Tel. & Tel., Fort Wayne	200
Mid-West Machine Co., Auburn	20
Lock Joint Tube Co., South Bend	40

(4) The United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO, reports that it has currently in effect 14 contracts containing agency shop clauses. Twelve of these, covering approximately 7,900 employees, are in Indiana, one covering 300 employees is in Iowa, and one covering 125 employees is in Nebraska.

While these data are admittedly fragmentary, it seems evident that agency shop clauses have become increasingly prevalent, and particularly in Indiana.

The decision below casts doubt on the validity of all of these agency shop clauses.

Their invalidation would have serious consequences for unions, employees, and employers. Unions and employers would be jointly and severally liable for the payment of back pay to any employees who had been discharged under these agency shop clauses, and, more important, for the restitution of agency shop fees—probably of *all* agency shop fees.[5] Also, under the Board's familiar *Hager Hinge* doctrine[6] contracts containing agency shop provisions would no longer bar an election on petition of a rival union. Even the prompt amendment of a contract to eliminate features held unlawful does not save the contract as an election bar. *McLeod* v. *Local 476, Industrial Workers*, 288 F. 2d 198 (2d Cir. 1961).

These consequences are all the more unjustifiable because they are unnecessary, resulting as they do from a tortured construction of the statute. But before examining the issue of statutory construction, we wish to call the Court's attention to another unstabilizing consequenc of the decision below.

2. The agency shop has served over the years as a useful compromise solution for disputes over union security. This role is jeopardized by the decision below.

Employers who have taken the position that they were unwilling, as a matter of principle, to enter into an agree-

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[5] During the period 1956-1961 the NLRB followed the policy of ordering the restitution of all dues and fees paid under a union security clause subsequently held to be illegal. This doctrine, first laid down in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594 (1956) was rejected by this Court in *Local 60, Carpenters Union* v. *NLRB*, 365 U.S. 651 (1961). However, under the criteria there laid down by this Court, an argument could be made for reimbursement of all agency shop fees, assuming the agency shop to be illegal, on the theory that employees who chose the option of paying fees, rather than that of joining the union and paying dues, probably would not have paid the fees voluntarily.

[6] *Hager & Sons Hinge Mfg. Co.*, 80 NLRB 163 (1948).

ment requiring employees to join a union which they might object to joining, have sometimes been willing to compromise upon an agency shop, which requires employees to contribute to the financial support of the union, but gives them the option whether to join. Many of the agency shop clauses enumerated *supra* in all probability originated as compromise solutions of such disputes.

A very recent compromise settlement of this sort is the agreement entered into on July 23, 1962 between Douglas Aircraft Company, Inc., and the United Automobile Workers (UAW), AFL-CIO, and the International Association of Machinists (IAM), AFL-CIO. The aircraft manufacturers had over the years resisted any sort of union security arrangement, but as part of the July 23 settlement Douglas Aircraft agreed to an agency shop. However, a suit has been filed in federal district court in Los Angeles challenging the legality of this agency shop provision, on the basis of the decision below in the present case.[7] Further, the uncertainty as to the legality of the agency shop created by the decision below is currently hampering the settlements of disputes between the UAW and IAM and other employers in the aerospace industry on the basis of the Douglas agency shop formula.[8] As long as the decision below stands

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[7] Bureau of National Affairs, Daily Labor Report, No. 162, August 20, 1962, p. A-3.

[8] John Herling's Labor Letter of August 4, 1962, states:

"*AGENCY SHOP AND AEROSPACE:* The labor-management battle in the aerospace industry employing more than 100,000 workers revolves around the issue of the agency shop, a form of union security which falls short of the union shop.

"This key issue of increased, though limited, union security confronts the newly appointed Presidential Commission, headed by Dr. George W. Taylor, veteran arbitrator of the University of Pennsylvania, Charles C. Killingsworth of Michigan State and Ralph Seward of Washington.

"Alone among the large manufacturing industries, the air-

it may as a practical matter inhibit use of the agency shop compromise, even though it is without binding effect outside of the Sixth Circuit.

The agency shop compromise has sometimes, according to Fortune Magazine, even served the interests of management. Fortune states:

> "In some cases the agency shop served a special management purpose. For several years before 1952, Western Union had a union-shop provision in its contracts covering 30,000 employees. In that year there was a bitter strike during which some union members crossed the picket line and returned to work. Fearing that these people would be expelled from the union as a result and therefore lose their jobs, Western Union refused to accede again to the union shop and compromised instead on an agency shop."[9]

The agency shop has also sometimes been used by unions to meet the objections of persons who refuse on religious grounds to join unions, and here too the compromise role

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craft manufacturers have over the years resisted the incorporation of the union shop in their contracts. A few weeks ago, however, one major company—Douglas Aircraft—did break the industry line and signed a contract with the two unions, which included an 'agency shop' for the first time.

"It is quite clear that most of the economic issues could be settled without too much difficulty along the Douglas pattern. But the unions insist that they had compromised on the economic issues with Douglas to achieve this union security breakthrough in the aircraft industry.

• • •

"A few weeks ago, the Court of Appeals in Indiana rejected the NLRB's reasoning and ordered the 'agency shop' ruling set aside. At once, this seemed to have triggered a new campaign by the National Right to Work Committee in California to stiffen the aerospace companies opposition to an 'agency shop.'"

[9] The Agency Shop, Fortune Magazine, January 1961, p. 176.

of the agency shop has been constructive.[10] Plainly, it serves no useful purpose to require, as does the decision below, that unions must either (1) insist that religious objectors actually join the union, on pain of discharge for refusal, or (2) forego insisting that religious objectors pay their share of the unions' costs.

Sensible solutions to the union security issue are difficult enough to arrive at without outlawing one—the agency shop—that has proved valuable in the past.

3. Only the clearest statutory language and legislative history would justify (i) overruling the long-standing Board decisions upholding the agency shop under both the Wagner and Taft-Hartley Acts, (ii) invalidating the large number of existing agency shop agreements, and (iii) depriving both management and labor of this compromise solution to disputes over union security. Far from there being any such language and history, every indication of congressional intent supports the validity of the agency shop as a reasonable means of resolving management-labor conflicts in this area.

Section 8(a)(3) of the National Labor Relations Act expressly permits an employer to make an agreement with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *." The question thus presented is whether this statutory language permits an employer and a union to enter into an agreement providing that employees who do not choose to

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[10] E.g., the contract between Local 135, UAW, and American Seating Company, Grand Rapids, Michigan, provides for a union shop except that objectors on religious grounds must pay a monthly fee in the same amount as the dues into the local union welfare fund.

become members of the union shall have the option of making support money payments equal to initiation fees and dues as a condition of their continued employment. We submit that requiring membership or payments equivalent to those paid by members meets the literal terms of § 8(a)(3)'s authorization to require membership as a condition of employment. However, whether or not an option of "membership or equivalent payments" is so precisely identical with a requirement of "membership" alone as to meet the literal terms of § 8(a)(3), it is clear that such an option of membership or equivalent payments falls within the plain intendment of the statutory language.

For, obviously, § 8(a)(3) does no more than to set the outer limit of what a collective bargaining agreement may provide in the way of union security. Under § 8(a)(3) a collective bargaining agreement may require membership of all employees on or after the thirtieth day; it may not require membership before employment, at employment, or at any time prior to the thirtieth day. Simply put, a collective bargaining agreement may not require *more* in the way of union security than membership of all employees at a stated time: nothing in the Act forbids requiring *less* in the way of union security than such membership.

Indeed, it will hardly be denied that § 8(a)(3) does permit something less in the way of union security than requiring membership by all employees on or after the thirtieth day. No one would suggest, for example, that a provision requiring membership on or after the fortieth day, instead of the thirtieth, would be invalid. Again, General Motors Corporation, respondent at bar, had a maintenance of membership agreement with the United Automobile Workers for many years; and under that agreement employees other than those who were members at the time of the agreement or who voluntarily became members

thereafter were exempted from the membership requirement.

Since a collective bargaining agreement may thus provide something less than a requirement of membership on or after the thirtieth day for all employees covered by an agreement, it follows inexorably that § 8(a)(3) only provides an outer limit of union security and not the sole form of union security permissible. The agency shop—omitting as it does from the requirement of membership those who choose to make equivalent support money payments—falls squarely within that perimeter.

The court below hardly addressed itself to this problem. It simply pronounced its *ipse dixit* that an agency shop arrangement is "different" from a union shop and not something "lesser." But whether one calls the agency shop lesser or different from a union shop, the simple fact is that the agency shop does provide *greater choice* to the employee than does the union shop—it gives him the option of being a union member or not being a member, which the union shop does not. Since Congress deemed the union shop a permissible restriction on the employee's freedom of choice, there could be no conceivable reason for striking down an arrangement which gives the employee the additional choice of making equivalent payments without joining the union.

To interpret the Act as permitting the union shop and prohibiting the agency shop is "to infer Congressional idiosyncrasy." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 393. And, in this instance, it is all the more far-fetched to infer Congressional idiosyncrasy because the legislative history of the Act is clear that lesser forms of union security, including the agency shop, were intended to be permissible under § 8(a)(3).

Without detailing the legislative history, we do call it to the Court's attention that, with respect to both the Wag-

ner and Taft-Hartley Acts, Congress evidenced an intent that the union security provision merely mark out the outer limit of the permissible; and that in the case of the Taft-Hartley Act Congress explicitly intended to permit the agency shop. The Senate Committee Report on the Wagner Act expressly states that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the *status quo* on this debatable subject but *leaves the way open to such agreements as might now legally be consummated* • • •." S. Rep. No. 573, 74th Cong., 1st Sess., pp. 11-12. (Emphasis supplied.) In the case of the Taft-Hartley Act, Senator Taft himself, in explaining § 8(a)(3), referred to the agency shop which had developed in Canada, under which, as Senator Taft put it, "If he pays the dues without joining the union, he has the right to be employed." 93 Cong. Rec. 4887, May 9, 1947. And, as also stated by Senator Taft during the debate: "• • • what we do, in effect, is to say that no one can get a free ride in such a shop. • • • The employee has to pay the union dues." 93 Cong. Rec. 3837, April 23, 1947. This Court summed up the legislative history in *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41: "Thus Congress recognized the validity of unions' concern about 'free riders' • • •." The failure of the court below to take note of that Congressional concern with "free riders" led it to its irrational conclusion.

4. The decision below is even more incompatible with the overall scheme of § 8(a)(3) than it is with the literal language validating the union shop. For, while § 8(a)(3) permits employers and unions to enter into union shop agreements, the second proviso of § 8(a)(3) does not permit enforcement of such union shop agreements by discharge of nonmember employees who tender dues and initiation fees. In other words, while § 8(a)(3) permits a union shop clause to be written into a collective bargain-

ing agreement, it only permits discharge of those who do not pay dues and initiation fees, which amounts to the same thing as an agency shop. The decision of the court below thus accomplishes the incongrous result that a clause providing for a union shop which may only be enforced as an agency shop is legal, but a clause providing for an agency shop is illegal.

The actual operation of § 8(a)(3) is illustrated by the decisions of the Board in *Union Starch and Refining Co.*, 87 NLRB 779 (1949) and *Marlin Rockwell Corp.*, 114 NLRB 553 (1955). In *Union Starch* two employees who tendered dues and initiation fees, and who said they were willing to join the union and attend meetings, refused on religious grounds to take the oath of loyalty to the union, which was one of the conditions for union membership. The union invoked a union shop provision and obtained their discharge for non-membership. The Board, basing its decision on part (B) of the second proviso to § 8(a)(3), found both the union and the employer guilty of unfair labor practices, on the ground that the discharged employees had been denied union membership for reasons other than failure to tender dues and initiation fees, i.e., for refusing to take the union oath. The Board said (87 NLRB at 784):

> "Throughout the amendment to the Act, Congress evinced a strong concern for protecting the individual employee in a right to refrain from union activity and to keep his job even in a union shop."

The Board's decision was approved and its order enforced by the circuit court; and certiorari was denied. *Union Starch and Refining Co.* v. *NLRB*, 186 F. 2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815.

This case was interpreted by the Board in *Marlin Rockwell* as holding that under a union shop contract an employee who tenders dues and initiation fees but refuses to

join the union cannot legally be discharged. The Board thus described its earlier decision (114 NLRB at 560):

> "The Board held, accordingly, that the mere refusal of the employees to join a union holding a valid union-shop contract, was not the kind of 'violation' of the union-shop contract which the union could lawfully enforce through discharge, or any other action affecting the employees' job security."

In *Marlin Rockwell* the Board held it an unfair labor practice for a union to invoke a maintenance of membership clause against employees who, while they continued to pay dues, had voluntarily resigned their union membership. The Board, following the reasoning of *Union Starch*, concluded that membership terminated by voluntary resignation was, in the language of proviso (B) of § 8(a)(3), "membership * * * terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees," and, therefore, not a permissible ground for discharge.

Thus the so-called union shop permitted by § 8(a)(3) is in practical effect enforceable only as an agency shop, since the union may not seek the discharge either of employees who resign from the union but continue to pay dues, or of employees who tender dues and initiation fees but refuse union membership.

The court below did not discuss these decisions, or any other decisions, or the effect of the second proviso to § 8 (a)(3). In its cursory denial of the Board's request for enforcement the court simply noted that § 8(a)(3) speaks in terms of "membership" "as a condition of employment" and declared that the "agency shop arrangement" is not the same thing. The court ignored the fact that while the first proviso to § 8(a)(3) speaks in union shop terms, i.e., "membership" "as a condition of employment," the

second proviso, and particularly part (B) thereof, imposes additional restrictions on the implementation of the union shop which equate the type of union security arrangement enforceable under the statute to an agency shop.

Since the Act permits a type of union security which is enforceable only as an agency shop, it is anomalous to hold, as did the court below, that an outright agency shop provision is illegal. It can hardly be the law that to be valid a union security provision must first provide for a union shop, using the language of the first proviso to § 8 (a)(3), and then limit it to, in effect, an agency shop, by incorporating the restrictions of the second proviso. The Act does not set forth a model union security provision for incorporation in contracts, and say that only it shall be valid, nor does it confer on the Board, or the court below, any power to devise and require the use of such a model provision. *Local 357, Teamsters Union* v. *NLRB*, 365 U.S. 667, 676-677.

The court below apparently also failed to comprehend the distinction between a union security provision under which employees are given the option of joining the union or paying the equivalent of initiation fee and dues while remaining outside of the union, and a provision which accords no option of joining. The court's opinion leaves the impression that the union was seeking an arrangement of the latter type.[11] But the decision of the Board unequivocally declares:

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[11] The court's opinion states:

"The Union made a demand in writing that the employer bargain with respect to its proposal that the existing National Agreement between the parties be supplemented so as to require as a condition of continued employment that all employees not already members of the Union, and new employees hired thereafter at the employer's Indiana locations must pay to the Union within thirty days after the agreement or of their

> "Second, there is no suggestion made anywhere in this proceeding that membership in the Union is not available to any nonmember employee who wishes to join. Everyone concedes that the Union was not seeking to bargain over a clause requiring nonmember employees to pay sums equal to dues and fees as a condition of employment while at the same time maintaining a closed-union policy with respect to applicants for membership."

The distinction, at best ignored by the court below, may well be crucial, for it would appear, and the union has never urged otherwise, that a provision requiring the payment of initiation fees and dues without an option of joining the union would indeed be invalid under the second proviso of § 8(a)(3), since membership would not be available "on the same terms and conditions" applicable to others. But where, as here, membership is available to all on equal terms, the option of non-membership can hardly result in invalidity.

5. Finally, the decision below conflicts in principle with the rationale of *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456, 47 LRRM 2782 (1961), *cert. denied sub nom. Local 498, Teamsters Union* v. *Higgins*, 368 U.S. 829, and *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, 48 LRRM 3119 (Fla. 1961), pending on petition for certiorari, No. 368, this Term.

In the *Higgins* case the Supreme Court of Kansas met the contentions that the state right-to-work law did not ban the agency shop, that § 14(b) did not authorize a State to ban the agency shop, and that the jurisdiction of the

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initial employment, whichever is later a sum equal to the initiation fee charged members of each of Union's locals and monthly sums equal to the regular membership dues required of its locals' members at each location. This type of arrangement is called an 'agency shop.'"

NLRB was exclusive, by pointing out that § 8(a)(3) permits the agency shop, and, in substance *only* the agency shop. The court declared (47 LRRM at 2787):

> "By virtue of the language in section 8(a)(3)(B) of the Taft-Hartley Act, heretofore quoted, it is apparent that the authority granted under this section is not primarily to compel membership in the union, but to permit the unions to *require* workers to pay dues and initiation fees to support the union."

The court further said (47 LRRM 2790):

> "But for the Kansas 'right-to-work' law the agency shop provision would presumably be a proper subject of negotiation in a collective bargaining agreement under the Taft-Hartley Act."

The Kansas court declared that since the agency shop, and, in substance, only the agency shop, is legal under § 8(a)(3), it follows that the state right-to-work law must have been intended to ban the agency shop, that Congress must have intended that § 14(b) enable States to ban the agency shop, and that the field is not preempted by the jurisdiction of the NLRB.[12] In the *Schermerhorn* case the Florida court did not analyze these issues as comprehensively or comprehendingly as had the Kansas court in *Higgins*, but it relied heavily upon the *Higgins* decision and upon this Court's denial of certiorari in that case.

The holding of the court below, that the execution of an agency shop agreement is an unfair labor practice under the federal Act, thus if correct, lends substantial support to the contention of the petitioner in *Schermerhorn* that the States do not have power under § 14(b) to ban agency shop agreements. If, on the other hand, the decision below is erroneous, as we contend, the support it gives to the argument of petitioner in *Schermerhorn*, that the

[12] Unlike the court below, the Kansas court discussed in extenso the language of § 8(a)(3) and the Board decisions construing it.

States may not ban the agency shop, disappears. On that assumption, however—i.e., that the agency shop is valid as a matter of federal law—the basic question presented by *Schermerhorn* whether the States have power under § 14(b) to ban the agency shop, is one of major importance.[13]

For it does not follow that if the decision below is erroneous the decisions of the state courts in *Higgins* and *Schermerhorn* are necessarily correct on that point. The Kansas court held, and the Florida court followed its ruling, that since the agency shop is embraced within the compass of § 8(a)(3)'s permission for union security arrangements, the agency shop should similarly be embraced within the compass of § 14(b)'s authorization for state prohibitions of union security arrangements. However, that is a *non sequitur*.

In § 8(a)(3) Congress uses the term "membership" as a "condition of employment" in delimiting the maximum form of union security *permissible* as a matter of federal law. Hence the Labor Board has correctly included lesser forms within the boundaries of what was permissible. On the other hand, in § 14(b) the language "agreements requiring membership in a labor organization as a condition of employment" is used by Congress to delimit the maximum reach of prohibitory state legislation. In view of this congressional purpose, it would seem that the States are not empowered by § 14(b) to invalidate union security arrangements which do not go so far as to require membership.

An illustration will make this plain. If a state government were to set a maximum *permissible* rural speed limit

[13] If, as the court below held, the agency shop is invalid under the federal Act, it is academic whether the States may ban it under § 14(b). Conversely, the question of state power is one of major importance if the decision below is incorrect.

of 50 miles an hour, this would obviously include permission for a driver to go at the lesser speed of 35 miles an hour. But if the state were to delegate to a county the authority to *prohibit* rural speeds of 50 miles an hour, this would just as obviously *not* include the authority to prohibit a driver from going at the lesser speed of 35 miles. Similarly, under § 8(a)(3), federal permission for the union shop includes permission for anything less; but under § 14(b), state prohibitions on membership requirements may *not* include prohibitions on anything less.

In view of the close though complex interrelationship between the issues presented in this case and in *Schermerhorn*, and of their difficulty and importance, we respectfully suggest that the Court consider the petitions in the two cases together, and we urge that it grant both.

CONCLUSION

We respectfully urge that the question of the legality of the agency shop is of such importance, the decision below so inadequate, and its results so mischievous, as to warrant review by this Court. It is respectfully urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, General Motors Corporation, files this Brief in Opposition to the Solicitor General's petition on behalf of the National Labor Relations Board for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in this case on June 8, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals and the two decisions of the National Labor Relations Board below are as cited by the Petitioner.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on June 8, 1962. Respondent was informed by the Clerk of the Court of Appeals for the Sixth Circuit in his letter transmitting a copy of the Court's opinion that the Court's Decree was entered on the same day—June 8, 1962—and not on July 3, 1962, as Petitioner states. Aside from this presumed inadvertent misstatement of fact on the part of the Petitioner, the jurisdictional requisites for filing the petition for certiorari appear to be adequately set forth in the petition.

QUESTION PRESENTED

Whether an "agency shop" arrangement—which requires that as a condition of continued employment those employes of an employer who are non-members of the labor organization proposing such an arrangement must pay to that labor organization a sum of money equivalent in amount to the initiation fee and periodic dues required of its members—is lawful under the National Labor Relations Act, as amended, so as to make it mandatory for an employer to bargain with the labor organization concerning such proposal.

The sole question presented involves only the legality of the "agency shop" under Federal law. The legality of the "agency shop" under the law of any state *is not* an issue in this case notwithstanding any impression to the contrary which may be created by Petitioner's wording of the "Question Presented."

STATUTES INVOLVED

The relevant statutory provisions of the National Labor Relations Act, as amended (61 Stat, 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) to interference with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from

making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an *unfair labor practice*) *to require as a condition of* employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made;

* * * * *

(3) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

STATEMENT OF THE CASE

I. THE BASIC FACTS WHICH RAISE THE ISSUE

General Motors Corporation, at all times relevant to the proceedings in this cause, had a three-year national collective bargaining agreement (P.A. 12a, Footnote 2)[1] with the International Union, UAW, AFL-CIO[2] which was entered into under date of October 2, 1958. This Agreement contained a provision making membership in the UAW a condition of continued employment for all employees covered by the Agreement. However, the Agreement also contained language which made this membership requirement inoperative in any state "which prohibits or otherwise makes unlawful membership in a labor

[1] "P.A." refers to the Appendix to General Motors' Brief filed in the Court of Appeals; "B.A." refers to the Appendix to the Board's Brief. "SG.Br." refers to the Solicitor General's Petition herein.

[2] Hereinafter referred to as the "UAW."

organization as a condition of employment" (P.A. 94a). Indiana has such a law (P.A. 54a). As a consequence, the "membership as a condition of continued employment" requirement of the aforementioned collective bargaining agreement could not be made operative with respect to those General Motors employes in Indiana Plants who were represented by the UAW and who were otherwise covered by that Agreement.

On October 20, 1959, the UAW proposed in writing that General Motors enter into an agreement supplementing the October 2, 1958 National Agreement which would require that all General Motors employes in the Corporation's Indiana Plants, who could not be compelled to become and remain members of the Union by reason of the aforementioned terms of the national collective bargaining agreement and the cited Indiana Statute, would nevertheless be required as a condition of continued employment to pay to the UAW a sum of money equivalent to the initiation fee and the monthly dues charged employes who were union members (P.A. 12a; 53a; 54a).

General Motors Corporation by written communication to the UAW dated October 27, 1959 stated that because an "agency shop arrangement • • • as detailed • • • in your letter of October 20, 1959 would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request" (P.A. 13a; 54a).

Upon these basic facts, the UAW filed unfair labor practice charges against General Motors with the National Labor Relations Board alleging an unlawful refusal to bargain.

A Complaint was issued by the National Labor Relations Board, and General Motors Corporation admitted its

refusal to bargain concerning the UAW's "agency shop" proposal but defended its position on the grounds that the "agency shop" was an illegal form of union security under the National Labor Relations Act, as amended, and as a consequence, it had no duty to bargain with respect to a matter which had an illegal objective.

II. THE ORIGINAL DECISION AND ORDER OF THE NLRB

On February 20, 1961, a majority of the National Labor Relations Board in a 3-to-2 decision reached the conclusion that an "agency shop" is illegal under the National Labor Relations Act, as amended, and further concluded that General Motors had not violated the law by refusing to bargain with the UAW concerning it (P.A. 9a-51a).

III. THE SUPPLEMENTAL DECISION AND ORDER OF THE NLRB

Approximately seven months later, following the filing of Motions for Reconsideration by the General Counsel of the National Labor Relations Board and by Counsel for the UAW, a newly constituted Board having two new members who replaced two of the three members of the Board who constituted the majority which held the "agency shop" illegal in the Board's original Decision and Order of February 20, 1961, set aside that decision, and in a 4-to-1 Supplemental Decision and Order dated September 29, 1961, concluded that the "agency shop" was not illegal under the National Labor Relations Act, as amended (P.A. 52a-72a).

This Supplemental Decision and Order was issued even though subsequent to the date of the original Decision and Order the statute had not been changed; no new evidence

had been discovered; no court decision, placing any different interpretation on the law as expressed in the Board's original Decision, had been handed down; and the newly constituted Board had heard no oral argument, as had the Board which issued the original Decision and Order.

IV. THE DECISION OF THE COURT OF APPEALS

It was the Board's Supplemental Decision and Order which General Motors asked the Court of Appeals for the Sixth Circuit to review. That Court in a unanimous opinion set aside the Board's Supplemental Decision and Order and denied the Board's request for enforcement for the reasons, and as stated, in its decision of June 8, 1962 (SG. Br. 21-26).

PETITIONER'S REASONS FOR GRANTING THE WRIT

The Petitioner makes three broad and general assertions under the above heading in its petition. In summary they are—

1. The Court of Appeals decision "casts doubt" upon the legality of the "agency shop" under the National Labor Relations Act, as amended (SG. Br. 8).

2. The "agency shop" should be recognized as a proper form of union security under the National Labor Relatio Act, as amended, because numerous employes are gedly covered by such an arrangement under numerous alleged collective bargaining agreements (SG. Br. 8-9).

3. The decision of the Court of Appeals constitutes "a formidable obstacle" to the solution of certain current disputes in the missile industry "involving the union security issue" (SG. Br. 10-11).

ARGUMENT

The stated reasons have neither substance nor merit.

I. THE PETITION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

A. There Is No "Doubt" Created by the Court of Appeals' Decision.

As to the first of such reasons, the decision of the Court of Appeals leaves no "doubt," as Petitioner suggests, concerning the status of the law with respect to the issue here raised. The Court of Appeals could have used no more simple, brief, and unequivocal language (SG. Br. 25-26) than it did to state that the "agency shop" is illegal under the National Labor Relations Act, as amended.

B. There Is No Conflict of Authoritative Federal Decisional Law.

There is no other decision of a court of comparable jurisdiction or stature which has held the "agency shop" to be legal.[3] Thus, there is no conflict of opinions between the federal courts of appeals. The Sixth Circuit is the highest Federal Court to have spoken on the issue here presented. Its decision at the present time constitutes authoritative

[3] While no question has been raised or is before this Court concerning the legality of the "agency shop" under state law, it is to be noted that Petitioner has volunteered the correct information that in the 10 states "that have passed upon the legality of the 'agency shop,' Indiana courts are the only ones which have upheld agency shop arrangements." (SG.Br. 19, Footnote 15)

Federal decisional law. What the Petitioner really is complaining about is its dislike for the decision. But such dislike, which is always the plight of the loser in a lawsuit, cannot be a persuasive or compelling reason which should move this Court to exercise its discretionary certiorari powers.

The second and third above-summarized reasons of the Petitioner "for granting the writ" deal in essence with an attempt to show that a question of national importance is before the Court. Petitioner attempts to demonstrate this through the use of figures and by means of an emotional plea.

II. THE "AGENCY SHOP" ARRANGEMENT BEING ILLEGAL FROM ITS INCEPTION CANNOT BE MADE LEGITIMATE AS THE RESULT OF BEING MADE A PART OF MANY COLLECTIVE BARGAINING AGREEMENTS.

This Court is urged to give weight to certain cited figures (SG. Br. 9, Footnote 6) purporting to show that numerous workers under numerous contracts are covered by "agency shop" arrangements. None of the figures presented were in the record made before the Trial Examiner which was the only record before the Board when it rendered its original and its supplemental Decisions and Orders. The cited figures, insofar as they relate to the extent to which "agency shop" provisions have been incorporated in a sampling of collective bargaining agreements, are the same as those set forth in the views of the minority of Board members who signed the original Board Decision and Order in this case, and are as set forth in the views of the majority of the Board members who signed the Supplemental Decision and Order of the Board in this

case. In each instance the Board members citing the figures indicated "they were not controlling of the legal issue" presented (P.A. 45; P.A. 61a).

The same figures can be no more controlling or persuasive today. The Court of Appeals has held the "agency shop" to be illegal. The fact that 100 or 100,000 employes may be covered by illegal "agency shop" contracts will not make such contracts legitimate, particularly when the governing law never made the contracts legitimate in the first instance.

III. THE PETITIONER'S ASSERTION THAT THE COURT OF APPEALS' DECISION IS A "FORMIDABLE OBSTACLE" TO THE SOLUTION OF DISPUTES IN THE MISSILE INDUSTRY IS WITHOUT FOUNDATION.

The third of Petitioner's "reasons for granting the writ" finds expression in the suggestion that the decision below has created a "formidable obstacle" to the solution of certain current disputes involving the union security issue in the missile industry (SG. Br. 10). This suggestion has not only a hollow ring, but, today, an empty one.

The special panel appointed by the President of the United States, and referred to by the Petitioner in its Petition, to seek solution of the union security issues in the missile industry filed its recommendations with the President subsequent to the filing of the Petition herein. The panel has recommended the union shop as a solution to the union security issue. At the time this Brief is being prepared there is every reason to believe, from reports in the public press, that most of the employers and labor organizations involved in the missle dispute have either accepted, or may accept, the Panel's "union shop" recom-

mendation; that as a consequence the union security issue will be resolved; and that industrial peace will prevail in the missle industry.

If such is the result, the Court of Appeals' decision which the Petitioner has envisioned as a "formidable obstacle" to the resolution of the missle industry's union security will prove to have been but a mirage. If such is not the result by the time the Court considers this Brief, the Court of Appeals' decision can in no sense be considered a "formidable obstacle" to the solution of the missle industry's union security issue in view of the fact that the decision is correct as demonstrated in the "argument" later herein.

IV. THE COURT OF APPEALS' DECISION IS CORRECT AND PETITIONER HAS RECOGNIZED THAT COURT'S INTERPRETATION OF THE CONTROLLING STATUTORY LANGUAGE TO BE UNASSAILABLE.

Aside from the arguments made by the Petitioner in connection with the aforementioned summarized "reasons for granting the writ," the only other plea made which requires an answer is that based upon the false assumption that the cited relevant statutory language sanctions an "agency shop" arrangement because it is a lesser form of union security than a union shop arrangement which is permissible under the law. The Circuit Court adequately and properly disposed of any such contention when it said;

> "We do not regard the 'agency shop arrangement' as being something lesser than a 'union shop.' We believe it is entirely different. A Union security agreement is premised upon membership in a labor organization. An 'agency shop' on the contrary is based upon an employee paying charges in

lieu of union membership as a condition of employment. (SG.Br. 25)

* * * * *

"We think the provisions of the Act are clear and unambiguous and need no judicial construction. The language of Section 7 of the Act which provides 'Employees * * * shall also have the right to refrain * * * except to the extent that such right may be affected by *an agreement requiring membership in a labor organization as a condition of employment* as authorized in Section 8(a)(3).' (29 U.S.C. Section 157) 'means what it says and excepts from the operation of the law only agreements requiring membership in a labor organization. (Italics ours.) An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute. In our opinion, the provision for an 'agency shop' would violate Section 7 and Sections 8(a)(1) and (3) of the Act as this type of arrangement is not excepted from the Act. The employer was therefore not required to bargain with respect to a proposal which was in violation of the Act." (SG.Br. 25-26)

It is clear from the foregoing that the Court of Appeals grounded its decision upon the language of Section 7 of the statute and its interrelationship to Section 8(a)(1) and (3) of the amended Act.

Both the Board's General Counsel (P.A. 6a) and the Solicitor General (SG. Br. 27) have recognized that Section 7 of the Act is one of the relevant statutory provisions which must be considered in disposing of the issue raised

in this case. However, just as the General Counsel of the Board, when he was before the Court of Appeals, did not address himself to the language of Section 7 and its application to this case, the Solicitor General now likewise avoids considering the Section 7 language, a necessity essential to a proper disposition of the issue herein.

An examination of the Solicitor General's argument and plea associated with the statutory language will not reveal a single word, phrase, footnote, or reference of any kind, to Section 7 of the language thereof. The Court of Appeals analysis and application of the specific language contained in Section 7, which puts to rest all of the arguments of the Solicitor General, is completely ignored by him, remains unchallenged and thus, presumably, is acknowledged by the Petitioner as irrefutable.

Nowhere in the amended National Labor Relations Act is there language expressly authorizing or permitting employers and labor organizations to enter into an "agency shop" agreement of the type here proposed by the UAW.

Such a bargaining demand and any agreement incorporating such a demand flies directly in the face of basic Federal labor policy as expressed in Section 7 of the National Labor Relations Act, as amended, which provides that:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* • • •." (Emphasis supplied.)

Congress here declared in clear and unequivocal language the right of employes not only to engage in union activities

and to undertake union obligations but also their concomitant right to refrain therefrom.

What this statement of national policy does make clear, and what is overlooked by the Petitioner in its contentions made herein, is that the Act was passed primarily to secure the rights of employes and not to enhance the position of labor organizations.

The Court of Appeals for the Fifth Circuit recognized this as the fundamental objective of the National Labor Relations Act, even before the important 1947 amendments to the Act were added, when it stated in *NLRB v. Schwartz*, 146 F.2d 773, 774 (CA-5; 1945):

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union."

Nothing in the Taft-Hartley amendments of 1947 or in any subsequent court decision renders the foregoing observation any less true today.

If Section 7, as amended in 1947, were limited solely to the enumeration of the rights specified therein, undeniably all forms of union security and, indeed, any scheme, device, or arrangement requiring an employe to engage in union activities or to render assistance in any form to a union would be unlawful as a direct infringement on the rights of employes guaranteed by that section.

The principal clause of Section 7, standing alone, renders *prima facie* unlawful not only the closed shop but also the union shop and maintenance of membership, as well as the "agency shop" proposed by the UAW herein. The vice inherent in each of these arrangements is that each necessarily interferes with the protected Section 7 right of employes to refrain from forming or joining or assisting labor organizations.

Accordingly, employers or labor organizations desirous of placing limitations on the exercise of the employe rights spelled out in Section 7 must find special sanction in the Act for such restrictions or suffer the consequences of committing an unlawful labor practice.

Having spelled out the rights of employes in the principal clause of Section 7, Congress carved out an exception to the exercise by employes of the otherwise unqualified rights guaranteed therein by providing that employers and labor organizations may lawfully agree to interfere with these protected rights (including the right to refrain from assisting a labor organization) but only to the extent of requiring *membership* in a union as a condition of employment as authorized in Section 8(a)(3) of the amended Act.

By the express terms of this exception, the one lawful permissible interference with the rights of employes guaranteed in Section 7 is strictly limited to agreements requiring *membership* in a labor organization and then only to such agreements requiring membership as are "authorized" in Section 8(a)(3) of the amended Act. The language does not provide that an agreement is "authorized" which requires the payment of service fees or carrying charges *in lieu of membership*. The reference in the Section 7 exception is clearly to the first proviso of Section 8(a)(3) wherein employers are permitted to make an agree-

ment with a labor organization to require as a condition of employment, *membership* in a union within a specified period of time providing certain other conditions, not here relevant, have been met.

Section 8(a)(3) provides in pertinent part that:

> "It shall be an unfair labor practice for an employer—
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That nothing in this Act,* or in any other statute of the United States *shall preclude an employer from making an agreement with a labor organization* * * * *to require as a condition of employment, membership therein* on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *." (Emphasis supplied.)

The Section 8(a)(3) proviso quoted above spells out in language which is clear and unequivocal on its face the *only* type of collective bargaining agreement that may permissibly infringe upon the rights guaranteed to employes in Section 7 and not expose an employer to a violation of Section 8(a)(3). Such an agreement must be limited to conditioning continued employment upon *membership* in a labor organization. An examination of the quoted proviso makes it clear, without the need to resort to legislative history or other aids to determine the intent of Congress, that to condition employment on anything other than *membership* in a labor organization is contrary to the mandate of the statute.

As an exception to, or limitation on, the national labor policy of securing employe rights as specified in Section 7 of the Act, sound principles of statutory construction require that the "union security" proviso of Section 8(a)(3) be strictly construed.

It is an established rule of statutory construction that a proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso. This Court in *Spokane and Inland R.R. v. United States*, 241 U.S. 344, 350 (1916) phrased the rule as follows:

> "But to so treat the Act would be in plain disregard of the *elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed* • • •." (Emphasis supplied.)

In *NLRB v. Electric Vacuum Cleaner Company, Inc.*, 315 U.S. 685, 694 (1942) this Court made the following observation concerning the construction to be placed on the first proviso of Section 8(a) of the original Act:

> "The provision for a closed shop, as permitted by §8(3), follows grammatically, a prohibition of discrimination in hiring. *These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization.*" (Emphasis supplied.)

The relationship between the national policy as expressed in Section 7 and the union security exception thereto is nowhere more clearly stated than in *Bryan Manufacturing Company*, 119 NLRB 502, 510 (1957) wherein former NLRB member Jenkins in his concurring opinion points out:

"Union-security clauses authorized by the proviso clause of Section 8(a)(3) are in derogation of the rights guaranteed employees in the definitive statement of national policy contained in Section 7. That section emancipates employees from coercion and restraint by labor and management alike. Their right to engage in or refrain from concerted activity at their own election has been enacted into law. But while that section enacted into law their rights to engage in or refrain from concerted activities at their election, the proviso clause allows a contractual compulsion of union membership and thus restricts the free choice otherwise provided by Sections 7 and 8(a)(3). The authority so conferred by the proviso is, however, carefully circumscribed by conditions precedent to and by limits upon its exercise. As an exception to declared public policy, a union-security clause, the conditions under which it was executed, and action pursuant to it merit, when subject to dispute, strict scrutiny."

On its face, it is apparent that the UAW's proposal for an "agency shop" does not involve "membership" as that term is commonly understood. Accordingly, to construe the quoted 8(a)(3) proviso which expressly limits the permissible scope of agreements requiring *membership* as a condition of employment, to authorize, as well, those agreements which require something *other than membership* as a condition of employment constitutes an unsound and offensive departure from the foregoing rule of statutory construction and subverts the general prohibition against discrimination which Congress spelled out in the principal clause of Section 8(a)(3) as well as the rights of employes protected by Section 7.

CONCLUSION

The Court of Appeals in holding the "agency shop" to be illegal under the National Labor Relations Act, as amended, correctly read and applied the applicable law as written.

There is no other Court of Appeals decision in conflict with the opinion of the Sixth Circuit.

The application of the language of Section 7 of the Act is basic to the resolution of the issue here presented. The Petitioner has acknowledged that Section 7 is "relevant" to the disposition of this case. The Petitioner has not challenged or addressed itself to the conclusion expressed by the Court of Appeals concerning the meaning and application of the language of Section 7 of the Act to the issue. It must be assumed therefore that the Appellate Court's views and conclusions concerning Section 7 are recognized by Petitioner as being unassailable.

The figures alluded to by Petitioner purporting to demonstrate that numerous collective bargaining agreements incorporating an "agency shop" arrangement covering numerous workers, are irrelevant because an "agency shop" arrangement, being illegal from its inception, cannot be made legitimate solely by the weight of numbers. Even the majority of the National Labor Relations Board members whose decision was set aside by the Court of Appeals recognized that the cited figures were not persuasive in resolving the legal issue presented.

The Petitioner's plea that this Court should review the Court of Appeals' decision because it constitutes a "formidable obstacle" to a solution of the union security issue in

the current missile industry dispute is without foundation. The Presidential panel appointed to find a solution to the dispute has recommended a "union shop" and as of this writing most of the companies and labor organizations involved or affected have reportedly received and considered the recommendation favorably.

The decision of the Court of Appeals is correct. For this reason, and the other foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 4, 1962.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 111–115) is reported at 303 F. 2d 428. The original decision and order of the National Labor Relations Board (R. 10–52) is reported at 130 NLRB 481, and the Board's supplemental decision and order (R. 53–73), vacating the original decision, is reported at 133 NLRB 451.

JURISDICTION

The opinion and judgment of the court of appeals was entered on June 8, 1962 (R. 110). The petition

for a writ of certiorari was filed on September 4, 1962, and was granted on November 19, 1962 (R. 116; 371 U.S. 908). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 45–46.

QUESTION PRESENTED

Whether an "agency shop"—which leaves union membership optional with the employee but requires that as a condition of continued employment he must nonetheless pay to the union a sum of money equivalent to the initiation fee and periodic dues paid by union members—is a form of union security sanctioned by the proviso to Section 8(a)(3) of the National Labor Relations Act, where such arrangement would be valid under State law.[1]

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

General Motors Corporation (the "Company") is a Delaware corporation engaged in the manufacture of automobiles and related products in Michigan and in

[1] The Board found that the Company refused to bargain in violation of Section 8(a)(5) of the Act by declining to discuss the Union's agency shop proposal. The propriety of the 8(a)(5) finding turns on the validity of the agency shop proposal.

other States (R. 12).[2] Its employees are represented for collective bargaining purposes by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, AFL–CIO (the "Union"), in a single, multi-plant, company-wide unit certified by the Board (R. 12, 56). The employees involved in this case are employed at the Company's plants and facilities in Indiana (R. 56).

The National Agreement in effect between the Company and the Union provides for maintenance of union membership and a union shop throughout the bargaining unit, under which employees are obligated to acquire and maintain membership in the Union as a condition of continued employment "to the extent of paying an initiation fee and the membership dues uniformly required" by the Union (R. 54; 101–102). These provisions do not apply, however, to any employees "employed in any state which prohibits, or otherwise makes unlawful, membership in a labor organization as a condition of employment" (R. 54; 79–80, 94). The union shop and maintenance-of-membership provisions of the National Agreement have never been made operative in Indiana, where a State statute known as the Indiana Right-to-Work Law[3] renders void and unenforceable any agreement conditioning employment upon union membership (R. 55–56; 79–80). None of the Company's Indiana employees has been required to become or remain a

[2] References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Burns' Ind. Statutes Ann. Sec. 40-2703 (P.S.C. Acts of 1957, Ch. 19, Sec. 3).

union member, and some do not wish either to become members[4] or to contribute to the Union's financial support (R. 76-77, 79-80).

On June 19, 1959, the Indiana Appellate Court, Second Division, held that an "agency shop" arrangement is valid in the State of Indiana. *Meade Electric Co.* v. *Hagberg,* 129 Ind. App. 631, 159 N.E. 2d 408. The term "agency shop" is used to define a contractual provision under which the employer undertakes to require all employees to contribute financial support to the union by paying a sum equivalent to the regular initiation fees and dues; the employee is not required to join the union and makes the payment upon the ground that the union is his bargaining agent because it has been selected by a majority of the employees in the bargaining unit as the exclusive representative for that unit.

The Union, by letter of October 20, 1959, made a proposal to the Company that a supplement to the existing agreement be negotiated providing for an agency shop arrangement "generally similar to that set forth in the *Meade Electric Co.* case." Under the proposed supplement the continued employment of all employees at the Company's plants in Indiana would be conditioned upon the payment of sums equal to the initiation fee and the regular monthly dues paid by union members at each location (R. 54-55; 74, 82, 99-100). Union membership would be avail-

[4] The National Agreement makes it mandatory upon the Union to accept into membership every employee who tenders the requisite initiation fees and dues (R. 60; 101-102).

able to the Indiana employees, at their option, upon tender of the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership (R. 60–61). Those employees who elected to join the Union were to accede to all the benefits, burdens and other incidents of membership on a non-discriminatory basis (R. 60). Those employees who chose not to join the Union were to be carried upon the Union's rolls as paying non-members and extended the right, under the Union's Constitution, to participate equally with members in the benefits flowing from the Union's use of such moneys for strike benefits, educational and retired members benefits, union publications, and the like (R. 60–62; 86–90, 95–97). As non-members, however, such employees were not to share in the other benefits or the burdens of membership, and were to have neither the duty nor the right to attend union meetings, to vote upon the ratification of agreements negotiated by the Union, or to participate in the Union's intra-organizational affairs (R. 86–87, 92).

As explained by Leonard Woodcock, the Union's vice-president and director of the General Motors Department, under the Union's proposal employees required to pay the amount of the initiation fee and of the monthly dues would be "entitled to the same benefits as a member unless they themselves choose not to make them available to them" (R. 61; 90, 86). According to Woodcock, the Union's Constitution, although written in the sense of membership, has been construed in practice to extend to non-members

under agency shops the right to receive the benefits previously enumerated (R. 61; 90, 104–108).

The Company, by letter of October 27, 1959, declined to bargain about the Union's request on the ground that an "'agency shop' arrangement * * * as * * * detailed in your letter of October 20, 1959, would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement" (R. 55; 75–76, 102–103).

Following the Company's refusal to bargain, the Union filed a charge that the Company had committed an unfair labor practice by refusing to bargain collectively, in violation of Sections 8(a) (5) and (1) of the National Labor Relations Act. A complaint issued; a hearing was held before a trial examiner; and the case was then transferred directly to the Board.[4]

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[4] The Company, in its answer to the complaint, admitted the Union's demand for bargaining and the Company's refusal to comply, but denied having committed an unfair labor practice (R. 8–9). At the hearing upon the complaint, the parties, after stipulating to the facts and taking the testimony of Vice President Woodcock of the Union, waived further proceedings before the Trial Examiner, and the case was transferred directly to the Board. In its original decision and order, the Board (with two members dissenting) concluded that no unfair labor practice had been committed, and directed dismissal of the complaint (R. 10–52). The General Counsel and the Union filed motions for reconsideration (R. 108–110); the Board granted the motions, vacated its previous decision and order, and issued the decision discussed in the text.

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board (one member dissenting) concluded that the Company's admitted refusal to bargain concerning the Union's agency shop proposal violated Sections 8(a)(5) and (1). In the Board's view, the Union's proposal "concerning a clause which would leave the final decision as to membership or non-membership with each individual employee, *at his option,* but * * * condition employment upon the payment of sums of money which would constitute each employee's share of financial support * * * fully comport[ed] with the Congressional intention in Section 8(a)(3) for the allowance of union security contracts, and, therefore, [was] a mandatory subject" for bargaining (R. 66). The Board further found that "neither Section 14(b), relating to the withdrawal of the Federal Act where State law prohibits the 'execution or application of agreements requiring membership in a labor organization as a condition of employment,' nor * * * the 'right-to-work' statute of Indiana" militated against that conclusion (R. 59).

The Board's order directs the Company to cease and desist from the violation found and from any like or related conduct. Affirmatively, the order requires the Company to bargain with the Union, upon request, concerning the Union's agency shop proposal or any like or related proposal, and to embody any understanding reached in a signed agreement (R. 68–69).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals set aside the Board's order (R. 111–115). The court concluded that the language in Section 7 of the Act, which gives employees the right to refrain from union activities "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)," excepts "from the operation of the law only agreements *requiring* membership in a labor organization. * * * An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it." (R. 115, emphasis supplied.)

SUMMARY OF ARGUMENT

The proposed agency shop agreement would not have violated Sections 8(a)(1) and (3) because it was covered by the proviso to Section 8(a)(3). The proviso's reference to "an agreement with a labor organization * * * to require as a condition of employment membership therein" covers not merely agreements requiring membership of all employees *in haec verba,* but all contracts calling for any lesser kind of compulsory association with, or support for, a labor organization which, but for the proviso, would violate the policy of the Act. The agency shop is such a form of compulsory unionism because, although it permits but does not require personal membership, it compels full financial support for the union and all its objectives as a condition of continued employment in the bargaining unit.

1. The union security proviso to Section 8(a)(3), as originally embodied in the Wagner Act, expressly permitted the closed shop (rather than, as now, the union shop). Its purpose, as the legislative history indicates, was to disclaim "a national policy hostile to the closed shop or other forms of union-security agreement" (*Algoma Plywood Co.* v. *Wisconsin Board*, 336 U.S. 301, 307), *i.e.*, to make clear that nothing in the Act was intended to illegalize such arrangements or to disturb their preexisting status under State law. Although Congress drafted the proviso in terms of the closed shop—the form of union security most inhibitive of personal freedom and the one whose legality was most frequently doubted—it obviously did not intend to withhold its approval from less restrictive types of union-security agreements. Accordingly, the Board consistently construed the Wagner Act proviso as not limited to the closed shop, but as covering union security contracts of all types, including preferential hiring agreements, maintenance of membership agreements, and even an agency shop arrangement similar to that proposed here (*Public Service Company of Colorado*, 89 NLRB 418).

2. In 1947, Congress amended the proviso to Section 8(a)(3), making the union shop, rather than the closed shop, the maximum form of union security permitted by federal law. There is no indication that Congress intended to upset the prior Board view that the proviso, though specifically mentioning only the most extreme form of union security sanctioned by federal law, privileges less inhibitive forms as well.

The legislative history of the amendment shows that Congress desired to remedy the most serious abuses of compulsory unionism which existed under the closed shop, but at the same time to permit agreements which would require all employees to share the cost of bargaining and thereby eliminate "free riders." Congress was aware of arrangements less restrictive than the union shop by which unions had apportioned the costs of representation among the employees in the bargaining unit, and in singling out the union shop it had no intention to preclude them. Indeed, Senator Taft analogized the Taft-Hartley union security provisions to the so-called "Rand formula," which had been devised in Canada and amounted to an agency shop (93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422). In light of this history, the Board has interpreted the amended proviso to Section 8(a)(3) as barring the closed shop, but as privileging the union shop there specified and any less stringent arrangement under which employees are required to pay the equivalent of union dues and initiation fees to the union as a condition of continued employment. See *American Seating Co.*, 98 NLRB 800.

3. The agency shop is a type of union security agreement closely similar to, but less restrictive of personal liberty than, the union shop, and not something "entirely different," as the court below regarded it. It is inconceivable that a Congress concerned with individual liberty but aware of the unfairness of "free riders" would have allowed contracts confronting employees with an ultimatum either to join the union and pay dues or surrender their jobs, but would not

permit an arrangement offering the same alternatives plus the further option to pay the dues without having to join the union. The dominant purpose of Congress in permitting the union shop—to enable unions and employers by mutual agreement to require all employees in a bargaining unit to contribute financial support to the bargaining agent—is also the purpose and only consequence of an agency shop.

Indeed, any meaningful distinction between the two types of arrangement is further blurred by the fact that, under the second proviso to Section 8(a)(3), the only incident of union membership which is enforceable as a condition of employment is the payment of initiation fees and periodic dues. This, and only this, obligation also inheres in the agency shop.

4. Section 14(b) of the Act allows the States to prohibit "agreements requiring membership in a labor organization as a condition of employment." Since this provision is cast in the same terms as the proviso to Section 8(a)(3), there is a strong presumption that the words have the same meaning. The legislative history of Section 14(b) tends to confirm that the agency shop is comprehended by the proviso, for it shows that Congress was aware of the forms of union security other than the conventional closed or union shop and meant to embrace all of them within the ambit of State regulatory power under Section 14(b).

This is not to say that Section 14(b), or the proviso to Section 8(a)(3), encompasses every agreement requiring employees to make payments to the labor organization which represents them. A contract

requiring the employee to pay his proportionate share of the cost of services actually rendered him by the union—that is, a service fee to defray the cost of maintaining a hiring hall, of processing grievances, or of performing other functions directly beneficial to all employees in the bargaining unit—might well be outside the area of "union security" altogether, and thus be immune to State regulation under Section 14(b) and valid under the national Act quite independently of the proviso to Section 8(a)(3). (*Schermerhorn* v. *Local 1625, Retail Clerks,* 141 So. 2d 269, now pending on certiorari, No. 368, this Term, may involve such an arrangement.) The agency shop, however, is quite different in its practical consequences from such a service fee arrangement, for it requires the nonmember not only to defray the expenses of collective bargaining for which he receives a *quid pro quo,* but also to finance welfare benefits, organizational efforts, political activity and other union objectives which do not benefit him directly and which he may regard as obnoxious, if not an infringement of his personal liberty. Accordingly, even if it were held that a true service fee is not subject to State prohibition under Section 14(b), this holding would in nowise impair the conclusion that an agency shop contract, such as the one here, is a form of "compulsory unionism" within the scope both of Section 14(b) and of the proviso to Section 8(a)(3). And, indeed, even if it were held that Section 14(b) is inapplicable to the agency shop because the term "membership" is to be read with literal exactitude, the agency shop would still be sanctioned by the proviso, for in that case the term

marks an outside limit—in the one case of State power to regulate and in the other of the employer's and union's freedom of contract.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE UNION'S AGENCY SHOP PROPOSAL WAS A FORM OF UNION SECURITY PERMITTED BY THE PROVISO TO SECTION 8(a)(3) OF THE ACT

INTRODUCTION

The Union sought a contract provision which left optional with the employee whether or not to become a union member but required that he nonetheless pay to the Union, as a condition of continued employment, a sum of money equivalent to the initiation fee and periodic dues paid by union members. The question presented is whether this type of arrangement, characterized as an "agency shop", is a form of union security permitted by the proviso to Section 8(a)(3) of the Act, where, as here, it is lawful under State law.*

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* The term "agency shop" as used herein refers to an arrangement whereby non-members are required to pay to the union sums equivalent to those paid by members—either an amount equal to both union dues and initiation fees or equal to dues alone. The Board is of the view that such an arrangement could be regulated by the States under Section 14(b) of the Act (see *infra*, pp. 34–43). Hence, if a State, unlike Indiana here, were to prohibit the agency shop, the Board would give effect to that policy and hold that an employer who refused to bargain about an agency shop in that State did not violate Section 8(a)(5) of the Act.

Retail Clerks International Association, Local 1625 v. *Schermerhorn*, No. 368, this Term, which has been set down for argument following the instant case, involves the question of State power under Section 14(b). The Board's views on this question are set forth *infra*, pp. 34–43.

The most familiar types of union security contracts[7] are the closed shop and the union shop. Under the former, an employee must be a member of the union in order to obtain employment; under the latter, the employee need not be a union member to obtain a job but must become one after a certain period if he desires to keep the job. The Act bans the closed shop, but the proviso to Section 8(a)(3) permits the union shop. The Union's agency shop proposal, like a union shop, would have required the employee to pay to the Union, as a condition of continued employment, the equivalent of union dues and initiation fees, but, unlike the union shop, it would give the employee an option whether to join the Union.

Arrangements of this type are now written into six percent of collective bargaining agreements, either alone or in conjunction with the union shop.[8] The

[7] We use the term "union security contract" to describe all collective bargaining agreements that protect the union, in some manner or degree, against loss of support among the employees in the bargaining unit. It includes all forms of closed shop, union shop, preference shop, agency shop, and maintenance-of-membership contract as well as such less-known agreements as those stipulating that a specified percentage of the employees must always be members of the union. As to whether a contract requiring a service fee belongs in this category, see pp. 34–43, *infra*. In most respects union security contracts are the equivalent of what their critics call "compulsory unionism."

[8] See *Collective Bargaining Negotiations and Contracts*, Bureau of National Affairs, vol. 2, sec. 87: 1–2; *Union Security and Checkoff Provisions*, National Industrial Conference Board, Studies in Personnel Policy No. 127, pp. 5, 49, 84–87 (1952); 82 Monthly Lab. Rev. 1340, 1352. See also, Brief for the AFL-CIO as *amicus curiae* in support of the petition for certiorari in this case, pp. 4–8.

agency shop has provided a compromise between the union's demand for the security granted by a closed or union shop agreement and the employer's unwillingness to compel any of his employees to join an organization as a condition of employment. The union is guaranteed the financial support required to carry on collective bargaining and to process grievances for the benefit of all the employees in the bargaining unit. Some of the money also goes to finance organizing campaigns, strikes and sundry legislative and political activities. The employer, on the other hand, is relieved from what he may consider the distasteful duty of disregarding the right of freedom of association or non-association by compelling men to become members of an organization they are unwilling to join. And the individual employee retains greater personal freedom. See Chamberlain, *The Problem of Union Security,* Proceedings of the Academy of Political Science, Vol. XXVI, pp. 11–13 (1954); *The Agency Shop,* Fortune Magazine, January 1961, p. 176.

Unless privileged by the proviso to Section 8(a)(3), the Union's proposal, if agreed to by the Company, would have violated Sections 8(a)(1) and (3) of the Act. For Section 7 gives employees the right not only "to form, join, or assist labor organizations," but also "the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." To require employees, in order to keep their jobs, to pay the equivalent of union dues and initiation fees to a labor or-

ganization under an arrangement not sanctioned by the proviso to Section 8(a)(3), restrains the exercise of the right to refrain from assisting a labor organization and also constitutes discrimination to encourage union membership within the meaning of Section 8(a)(3).

The Board's bargaining order turns on the validity of the agency shop proposal. If it was not violative of Sections 8(a) (1) and (3), it was within the area of mandatory bargaining under the Act, and the Company refused to bargain in violation of Section 8(a) (5) by declining to discuss it. *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342. If the agency shop proposal was violative of the Act, the Company was not required to bargain about it.

The court of appeals concluded that the agency shop proposal would call for unfair labor practices violating Section 8(a)(3), because the proviso refers only to agreements *requiring union membership* (*i.e.*, the union shop). In our view the words "an agreement with a labor organization * * * to require as a condition of employment membership therein" are not to be read so strictly as to limit the exception to contracts requiring membership of all employees *in haec verba*. They were used as a convenient description of all kinds of formal agreement putting pressure upon any employee to enter into association with, or otherwise support, a labor organization in a manner which, but for the proviso, would violate the Act. The agency shop is such a form of compulsory unionism because, although it permits but does not compel

personal membership, it requires full financial support for the union and all its objectives as a condition of continued employment in the bargaining unit.

This view, we submit, is supported by the legislative history, policy and administrative interpretation of both the Wagner and Taft-Hartley Acts. Even if the words are to be read more literally, however, the judgment of the court of appeals should be reversed. For in that event the words mark the outer limit of the exception carried out by the proviso and contracts, like the agency shop, which are well within the limits, are privileged against attack under the unfair labor practice provisions.

A. *Under the Wagner Act, the proviso to Section 8(a)(3) was viewed as sanctioning, insofar as federal law was concerned, not only the closed shop, but also lesser forms of union security*

Section 8(3) of the Wagner Act made it an unfair labor practice for an employer—

> [b]y discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization: *Provided,* That nothing in this act * * * or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a) * * *.

The language of the proviso, as this Court noted in *Algoma Plywood Co. v. Wisconsin Board,* 336 U.S. 301, 307, was intended to disclaim "a national policy

hostile to the closed shop or other forms of union-security agreement."[9] Congress wanted to make clear that neither the Act, nor any other federal statute, abridged the preexisting right of the employer and the representative of his employees to bargain for a closed shop or any other form of union security valid under State law. The Senate report on the bill which was ultimately enacted stated that the reason for inserting the proviso was as follows:

> * * * According to some interpretations, the provision of section 7(a) of the National Industrial Recovery Act, assuring the freedom of employees "to organize and bargain collectively through representatives of their own choosing," was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7(a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.[10]

The proviso was drafted in terms of the closed shop, not because Congress wished to exclude other types of union security, but because closed shop contracts had

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[9] In *Algoma*, the chief issue was whether the States were barred from regulating maintenance-of-membership contracts on the ground that such contracts were sanctioned by the proviso to Section 8(3) of the Wagner Act. Although the Court held that the proviso was not intended to preclude the States from pursuing their own more restrictive policies in the matter of union security agreements, it appeared to assume that the proviso privileged maintenance-of-membership no less than union shop contracts.

[10] S. Rep. No. 573, 74th Cong., 1st Sess., 11-12, 2 Leg. Hist. of the NLRA, 1935 (G.P.O., 1949), hereafter designated "Leg. Hist. (1935)," 2311. See also, H. Rept. No. 969, 74th Cong., 1st Sess., 17, 2 Leg. Hist. (1935) 2927.

been the most frequent source of the doubt which the proviso sought to eliminate.

The Senate Committee, in a memorandum pointing out the differences between the final bill and an earlier draft, stated that [emphasis added]:

> * * * [u]nless this change is made as provided in S. 1958, most strikes for a closed shop or *even for a preferential shop* would by this act in effect be declared to be for an illegal purpose, and hence would be enjoinable in many States. * * *
>
> As the legislative history of 7(a) [of the National Industrial Recovery Act] demonstrates, nothing in that section was indended to deprive labor of its existing right in many States to contract or strike for a closed *or preferential shop.* [Citing legislative history and court cases.] No reason appears for a contrary view here."[11]

It is apparent that these reports used the term "closed shop" loosely, as was then often common parlance, to describe all forms of "union security agreements," as they would now be called. None of the purposes which led Congress to adopt the proviso could possibly be served by confining it to the closed shop; indeed, it is unbelievable that Congress, though disavowing any intent to illegalize the most widely criticized form of union security, should have wished to condemn other, less onerous, forms. The Board, therefore, consistently construed the Wagner Act proviso as not limited to the closed shop, but as exempting

[11] Comparison of S. 2926 and S. 1958, 28–29, 1 Leg. Hist. (1935) 1354–1355.

all types of union security contracts, if otherwise valid, from the prohibitions of the Act."[12] Indeed, in *Public Service Company of Colorado*, 89 NLRB 418, the Board held that the proviso privileged an arrangement similar to the agency shop proposal here, which provided that those employees who were not subject to the maintenance of membership clause and thus not

[12] See, *e.g.*, *National Electric Products Corp.*, 3 NLRB 475, 506, 507. (contract requiring union membership or, in the alternative, deduction of dues); *Waterman Steamship Corp.*, 7 NLRB 237, 243, modified, 103 F. 2d 157 (C.A. 5), modification reversed, 309 U.S. 206 (preferential hiring contract giving union members "preference of employment" but requiring such preference only "as vacancies occur" and not requiring the discharge of employees who refuse to join); see also, *Isthmian Steamship Co.*, 22 NLRB 689, 699, enforced as modified, 126 F. 2d 598 (C.A. 2); *Pilot Radio Corp.*, 14 NLRB 1084, 1104–1105; *Peninsular & Occidental Steamship Co.*, 5 NLRB 959, 967, 968, set aside, 98 F. 2d 411 (C.A. 5), certiorari denied, 305 U.S. 653; *M. & J. Tracy*, 12 NLRB 916, 932–934 (preferential employment contract giving members of contracting union preference for all work); see also, *J. E. Pearce Contracting & Stevedoring Co., Inc.*, 20 NLRB 1061, 1070–1073; *Phelps-Dodge Copper Products Corp.*, 63 NLRB 686 (requiring employees who were union members to maintain such membership); see also, *Eureka Vacuum Cleaner Co.*, 69 NLRB 878; *The Cliffs Dow Chemical Co.*, 64 NLRB 1419; Opinion of Robert B. Watts, NLRB General Counsel, *Opinion on Legality of Union Maintenance Clauses*, 10 LRRM 1924; *Matter of Mill B., Inc.*, 40 NLRB 346, 348 (maintenance-of-membership and union shop contract; any employee failing to maintain membership or to make application for membership, or whose application for membership was rejected, to be discharged upon written notice to the employer); see also, *Diamond T Motor Car Co.*, 64 NLRB 1225 (union shop); *Electric Vacuum Cleaner Co.*, 18 NLRB 591, 613–614, set aside, 120 F. 2d 611 (C.A. 6), reversed, 315 U.S. 685 (modified union shop; contract required new employees after a work probation period to join the contracting union, but left old employees free to join rival union, to decline to join or to drop

required to become union members, were required to pay to the union $2.00 per month "for the support of the bargaining unit."[13] Rejecting the contention that the provision was not within the proviso because it did not require union membership, the Board stated (*id.*, at 423):

> It seems clear from the Wagner Act's legislative history that the proviso to Section 8(3) was intended to be permissive and not exclusive in character. It does not appear to have been the intent of Congress to select only a *particular* type of union security agreement to be exempted from the operation of the Act. On the contrary, it is reasonable to infer that *any* agreement "as might now be legally consummated" was immunized by the terms of the proviso. Certainly, agreements affording varying measures of security to a contracting labor organization, other than "membership" guarantees, could "then" legally have been consummated in most States. [Footnotes omitted.][14]

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their membership in the contracting union, or to urge new employees to change union affiliation).

[13] Although this case was decided in 1950, it was still governed by the Wagner Act because the agreement was covered by the savings clause in Section 102 of the Labor-Management Relations Act, 1947 (see 89 NLRB at 419–420).

[14] It is also significant that the War Labor Board, which was required by the War Labor Disputes Act (57 Stat. 163, 166) to conform to the provisions of the NLRA, directed the execution or retention of contracts with "support money" provisions similar to the agency shop provision here. See, e.g., *Southern Colorado Power Co.*, 18 WLR 314, 318–319 (employees, whether or not union members, required to share equally in the cost of maintaining and operating the collective bargaining agency); *Alexander Primas Co.*, 21 WLR 219, 221 (company to deduct

There is nothing to the contrary in *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685. The Court there said (p. 695) that the "words of the [closed shop] exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization." However, the Court was drawing a distinction between uncanalized employer interference with freedom of choice prior to the execution of a closed shop contract and the privilege of requiring union membership as a condition of employment after such a contract had been executed. In other words, the Court was addressing itself to the contention that, once the union had been freely selected by a majority of the employees, the proviso to 8(3) should be construed as permitting the employer, even absent a contract, to assist the union in obtaining members, and not to whether the proviso to 8(3) permitted not only closed shop contracts but also contracts providing lesser forms of union security.

B. The Taft-Hartley amendments outlawed the closed shop, but did not otherwise change the basic scheme of the proviso

Congress, in the 1947 Taft-Hartley amendments, retained the language of the original proviso to Section 8(3) that—

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union dues of members and representation fee of same amount from non-members); *Federal Shipbuilding & Drydock Co.*, 1 WLR 140, 142 (under maintenance of membership clause, employee not in good standing not to be discharged provided he agreed as a condition of employment to the deduction of his financial obligation to the union).

> nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein

but added the following:

> on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.[15]

On its face, this amendment indicates an intention to make the union shop, rather than the closed shop, the maximum form of union security permitted by federal law. There is no indication that Congress intended to go further and outlaw lesser types of union security arrangements or to upset the prior Board view that the proviso, though specifically mentioning

[15] There was also a requirement that the union security provision be authorized by a vote of a majority of the employees in a Board conducted election. This requirement was eliminated from the act in 1951 (65 Stat. 601).

only the most extreme form of union security sanctioned by federal law, privileges less inhibitive forms as well.

The legislative history of the Taft-Hartley amendments supports this analysis. It shows that Congress desired to remedy the most serious abuses of compulsory unionism, which existed under the closed shop, but at the same time to permit the union and the employer to continue arrangements which would require all employees to share the cost of bargaining and thereby eliminate "free riders."

Thus, the Senate Report, in explaining the amendment which was ultimately adopted, stated (S. Rep. No. 105, 80th Cong., 1st Sess., p. 6, 1 Leg. Hist. of the LMRA, 1947 (G.P.O., 1948), hereafter designated "Leg. Hist. (1947)," pp. 412–413):

> * * * on the record before us the abuses of the system have become too serious and numerous to justify permitting present law to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. * * *[16]

[16] Among the abuses of compulsory union membership noted were (all references are to "Leg. Hist. (1947)"): preventing an employee from campaigning to displace the incumbent union with a union more to the employee's liking (S. Rep. No. 105, 80th Cong., 1st Sess., pp. 21–22, 1 Leg. Hist. 427–428; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 44, 1 Leg. Hist. 548); causing the discharge of a union member expelled from the union because he testified against a union shop steward (S. Rep. No. 105, pp. 6–7, 1 Leg. Hist. 412–413; 93 Cong. Rec. 3837, 4135, 4193, 4886, 2 Leg. Hist. 1010, 1062, 1096, 1420); expulsion

The report added, however, that many "leaders of organized labor have stressed the fact that in the absence of [union security] provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost" (S. Rep. No. 105, p. 6, 1 Leg. Hist. (1947) 412). Accordingly, a compromise was adopted. Although the closed shop was barred, "employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," subject to the qualification that "expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fee or dues" (S. Rep. No. 105, p. 7, 1 Leg. Hist. (1947) 413). These amendments, the Senate Committee concluded (*ibid.*):

> remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating "free riders" the right to continue such arrangements."

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and discharge of union members because of a refusal to contribute to a political fund, an attempt to run for office against the incumbent president of the international, refusal to purchase a ticket for a raffle supported by the union, and the display of an antiunion attitude (93 Cong. Rec. 4135, 4432, 4191, 2 Leg. Hist. 1061–1062, 1199, 1094).

[17] Senator Taft voiced the same view in his initial speech on the floor of the Senate explaining the amendments (93 Cong. Rec. 3837, 2 Leg. Hist. (1947) 1010):

"In other words, what we do, in effect, is to say that no one can get a free ride in such a shop. That meets one of the arguments for the union shop. The employee has to pay the union dues."

Congress was aware that there were arrangements less restrictive than the union shop by which unions had apportioned the costs of representation among the employees in the bargaining unit, and in singling out the union shop it had no intention to preclude them. The Senate Report stated that the bill "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership * * *." (S. Rep. No. 105, p. 3, 1 Leg. Hist. (1947) 409)." Moreover, Secretary of Labor Schwellenbach, in his testimony before the Senate Labor Committee, enumerated several different types of union security arrangements then in use under collective agreements, including closed shop, union shop, maintenance of membership, preferential hiring, employer encouragement of union membership (the so-called "harmony clause"), and the check-off of union dues (a device which could be used in connection with any of the preceding types of provisions). As a further example, Secretary Schwellenbach specifically cited a widely known arbitration decision by Justice Rand of the Supreme Court of Canada in a dispute involving the United Auto Workers and the Ford Motor Company of Canada. 1 Lab. Arb. Rep. 439, 17 LRRM 2782. The award denied the UAW's request for a full union shop, but directed "an automatic check-off of union dues for all employees re-

[11] See also, H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 41, 1 Leg. Hist. (1947) 545.

gardless of union membership."[19] Expressing approval of the "Rand formula," and analogizing the Taft-Hartley union security provision to that formula, Senator Taft stated (93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422):

> the rule adopted by the [Conference] committee is substantially the rule now in effect in Canada * * *. [T]he present rule in Canada is that * * * the employee must, nevertheless, pay dues, even though he does not join the union.
>
> If he pays the dues without joining the union, he has the right to be employed. * * *[20]

In light of this legislative history,[21] the Board has interpreted the Taft-Hartley amendments as barring

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[19] Hearings before the Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Sess., on S. 55 and S. J. Res. 22, pp. 64–67. See also, *id.*, at 806 (statement of Cecil B. DeMille).

[20] In one respect, Senator Taft did distinguish between the Canadian rule and the Committee amendments. He felt that, because the Rand formula had been imposed upon the parties by law and was not voluntarily agreed to, it amounted to "a kind of tax, if you please, for union support," and he therefore stated that "there is no constitutional way by which we can do that in the United States" (93 Cong. Rec. 4887, 2 Leg. Hist. (1947) 1422). Whether or not this view was correct, Senator Taft clearly did not regard the agency shop itself an an unconstitutional form of union security when freely entered into by the parties, nor did he suggest that it was otherwise unlawful under the Conference bill.

[21] See also the history of Section 14(b), *infra*, pp. 35–37.

the closed shop"[21] but not otherwise changing the scheme of the proviso as it operated under the Wagner Act. Thus, it has held that the proviso privileges not only the union shop but any less stringent arrangement under which employees are required to pay the equivalent of union dues and initiation fees to the union as a condition of continued employment.[22] The Board has sustained not only such lesser arrangements which impose a formal membership requirement, like a maintenance of membership agreement," but also arrangements which impose no such requirement. In *American Seating Co.*, 98 NLRB 800, the Board held that the Taft-Hartley proviso was applicable to an agreement which contained, in addition to the usual union shop provision, a provision excepting any employee "who has religious objections to union membership" from the requirement of membership but requiring him to pay into the union welfare fund sums equivalent to the union dues. The Board stated (*id.*, at 802):

> As the precise language of the 8(3) proviso in the Wagner Act was continued in the amended Act with certain added qualifications not pertinent here, and because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining

[21] This includes agreements requiring union membership as a condition of employment as well as those giving a preference in hiring to union members. See *American Export Lines*, 81 NLRB 1370; *F. J. Kress Box Co.*, 97 NLRB 1109.

[22] See *Pressed Steel Car Co.*, 89 NLRB 276; *West Steel Casting Co.*, 98 NLRB 153; *Arvin Industries*, 104 NLRB 300.

> support payments from nonunion members who would otherwise be "free riders," we find that the provision for support payments * * * does not exceed the union security agreements authorized by the Act. [Footnotes omitted.]

See also, *Union Starch & Refining Co.*, 87 NLRB 779, discussed *infra*, pp. 32–33.

C. The agency shop is a form of union security contract closely resembling, but less restrictive of personal liberty than, the union shop

The court below misconceived the nature of the union security contracts permitted by the proviso to Section 8(a)(3) when it held that the agency shop is "entirely different" (R. 114). Many familiar forms of union security contract omit one or more of the requirements of a true union shop. Thus, a maintenance of membership clause does not require any non-member to become a union member as a condition of employment, and many such contracts even provide an "escape period" during which members may withdraw without losing their jobs. Other contracts, less common but not unfamiliar, have provided that a specified proportion of the employees must be union members, thus freeing many individual objectors from the obligations of membership. The agency shop is also less inhibitory of individual freedom but, instead of freeing some of the employees from all the obligations of union membership, it frees all the employees from the personal, and retains the financial, obligations. It is inconceivable that a Congress that was concerned with individual liberty but aware of

the unfairness of "free riders" would have allowed contracts confronting employees with an ultimatum either to join the union and pay dues or surrender their jobs, but would not permit an arrangement which offered the same alternatives, plus the further option to pay the dues without being forced to join the union.

The similarity between the union shop and the agency shop, as well as the degree of compulsory unionism involved in the agency shop, is apparent when one notes that the agency shop requires full financial support even from the employee who elects not to become a member. He must pay the initiation fee and periodic dues. This is not merely compensation for services rendered directly to employees in the bargaining unit. The money also goes to promote union organization both in the shop and elsewhere, to finance public relations, legislative and political activities and to finance strikes. While the employee is free to refrain from personal activity or association with the labor organization, the compulsion to give financial support is as complete as under the union shop.

The distinction between the union shop and agency shop is obviously unimportant in terms of the policies of the National Labor Relations Act. There is no freedom guaranteed by Section 7 that the union shop leaves unimpaired but the agency shop curtails. There is no danger that the agency shop would force employees into an inferior position as "taxpayers" without the rights of "citizens," for the Union's proposal called for offering every employee full member-

ship. The dominant purpose of Congress in permitting the union shop was to enable unions and employers, by mutual agreement, to require all the employees in a bargaining unit to contribute full financial support to the bargaining agent (see *supra*, pp. 24–27). This is the purpose and only consequence of an agency shop.

Indeed, any meaningful distinction between the two types of arrangement is further blurred by the fact that the only obligation of union membership which can be enforced under the union shop by threatening the employee's job is the obligation to pay membership dues and initiation fees, the sole obligation that the agency shop, too, imposes. Thus, the second proviso to Section 8(a)(3) provides that the employer may not discharge an employee under a union shop agreement—

> * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to render the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership * * *.

In *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40–41, this Court stated (emphasis added):

> The policy of the Act is to insulate employees' jobs from their organizational rights. * * * The only limitation Congress has chosen to impose * * * is specified in the proviso to § 8(a)(3) which authorizes employers to enter

> into certain union security contracts * * *. [*The*] ***legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders,"*** i.e., employees who receive the benefits of union representation but are unwilling to contribute their fair share of financial support to such union, ***and gave the unions the power to contract to meet that problem*** while withholding from unions the power to cause the discharge of employees for any other reason. * * *

In *Union Starch & Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008, certiorari denied, 342 U.S. 815, the Seventh Circuit affirmed the Board's holding that "employees who request union membership and tender initiation fees and dues, but fail to comply with other union-imposed conditions for acquisition of membership, are protected by the Act from discharge under the terms of a valid union security agreement" (*id.* at 1010).[24] The court found "that [the Board's] interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payment of dues and initiation fees" (*id.* at 1012). Similarly, the courts have repeatedly affirmed Board holdings that the loss of membership in good standing occasioned by factors other than a failure to pay

[24] The employees had declined, for religious reasons, to take the oath which the union required as a condition of membership.

initiation fees and periodic dues—*e.g.*, non-payment of fines and assessments,[25] refusals to participate in union activities such as picketing,[26] participation in dual union activities,[27] and noncompliance in other respects with a union's internal rules of membership[28]—will not support a discharge even though based upon a valid compulsory membership contract. As the Board stated in its decision below (R. 64), even "in those cases * * * where 'membership' is specifically required in a valid union-security contract, the union in particular situations cannot enforce the

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[25] *National Labor Relations Board* v. *Food Fair Stores*, 307 F. 2d 3 (C.A. 3); *National Automotive Fibres, Inc.*, 121 NLRB 1358, enforced as modified, 277 F. 2d 779 (C.A. 9); *Injection Molding Co.*, 104 NLRB 639, 645, enforced as modified, 211 F. 2d 59 (C.A. 8); *Peerless Tool & Engineering Co.*, 111 NLRB 853, enforced, 231 F. 2d 298 (C.A. 7), certiorari denied, 352 U.S. 833.

[26] *Eclipse Lumber Co.*, 95 NLRB 464, enforced, 199 F. 2d 684 (C.A. 9); *Waterfront Employers of Washington*, 98 NLRB 284, 318, 320, enforced, 211 F. 2d 946, 950 (C.A. 9); *Local 450, International Union of Operating Engineers*, 122 NLRB 564, 567, enforced as modified, 281 F. 2d 313, 316 (C.A. 5), certiorari denied, 366 U.S. 909.

[27] *Local 815, International Brotherhood of Teamsters*, 127 NLRB 993, enforced, 290 F. 2d 99 (C.A. 2); *Pape Broadcasting Co.*, 104 NLRB 29, enforced as modified, 217 F. 2d 197 (C.A. 5); *Utley Co.*, 108 NLRB 295, enforced, 217 F. 2d 885 (C.A. 6); *Mechanics Educational Society of America*, 109 NLRB 838, enforced, 222 F. 2d 429 (C.A. 6).

[28] *Philadelphia Iron Works*, 103 NLRB 596, enforced, 211 F. 2d 937 (C.A. 3); *Local 803, International Brotherhood of Boilermakers*, 107 NLRB 1011, enforced, 218 F. 2d 299 (C.A. 3); *Electric Auto-Lite Co.*, 92 NLRB 1073, enforced, 196 F. 2d 500 (C.A. 6), certiorari denied, 344 U.S. 823; cf. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 30–32.

actual membership requirement but can obtain at most the periodic dues and initiation fees."

In short, these decisions clearly show that, under the second proviso to Section 8(a)(3), the only incident of union membership which is enforceable as a condition of employment is the payment of initiation fees and periodic dues. This, and only this, obligation also inheres in the agency shop. Thus, the same limited statutory policy—barring "free riders" by permitting the costs of collective bargaining to be allocated among all the employees who benefit from it, members and nonmembers alike—is just as well served by the agency shop arrangement contemplated here as by the more conventional arrangement requiring full-fledged union membership. Conversely, the type of agency shop involved in this case, which permits any employee who wishes to become a member of the union, has no consequences not also incident to a permitted union shop.

D. While the legislative history of Section 14(b) tends to confirm that the agency shop is a form of union security encompassed both by that section and by the proviso to Section 8(a)(3), a contrary construction of Section 14(b) would not control the meaning of the proviso

Section 14(b), added by the Taft-Hartley amendments in 1947, provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 8(a)(3), as explained above, provides that nothing in federal law shall preclude an employer from making—

> an agreement with a labor organization * * * to require as a condition of employment membership therein * * *

And Section 7 qualifies the guaranteed rights of employees—"except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3)."

Since the three provisions use the same words, there is a strong presumption that they have the some meaning. The legislative history of Section 14(b) would therefore seem to throw light upon the meaning of Sections 7 and 8(a)(3), and the history tends to confirm the view that an agency shop agreement—*i.e.* a contract requiring employees in the bargaining unit to pay the full initiation fees and dues with individual freedom of choice about joining the union—is comprehended within the area carved out by the proviso as an exception to the other provisions of the Act. For the legislative history shows that Congress was aware of the forms of union security other than the conventional closed or union shop, and that it intended to embrace all of them within the area that the States would be permitted to regulate under Section 14(b). Thus, the House Committee Report (H. Rep. No. 245, 80th Cong., 1st Sess. 34, 1 Leg. Hist. (1947) 325), in enumerating the State laws respecting compulsory unionism which would not be displaced by the

NLRA, listed several which specifically banned not only agreements conditioning employment on union membership, but also contracts requiring merely the payment of the equivalent of dues or initiation fees."

The House Conference Report also stated (H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. (1947) 564, emphasis added):

> Under the House Bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, *or other form of compulsory unionism agreement* in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make *all forms of compulsory unionism* in those States illegal. It was never the intention of the National Labor Relations Act * * * to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. * * * To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same affect.[30]

Thus, the purpose of Section 14(b) was to meet the fear that the amendment to the proviso to Section 8(a)(3) outlawing the closed shop would inspire the

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[29] *E.g.*, the laws of Alabama, Arkansas, Georgia and Tennessee. See *The Agency Shop: A Lawful Form of Union Security?*, 57 N.W.U.L. Rev. 75, 86–88 (1962).

[30] See also, H. Rep. No. 245, 80th Cong., 1st Sess. 44, 1 Leg. Hist. (1947) 335.

inference that Congress had taken hold of the subject of union security and ousted State jurisdiction. Section 14(b) was aimed at preserving for the States the same freedom which they had previously enjoyed to regulate all forms of compulsory support for labor organizations, just as the historic purpose of the proviso has been to preserve for employers and labor organizations representing a majority of the employees their freedom from federal restrictions against the negotiation of contracts requiring compulsory support. Accordingly, Section 14(b) has been held to authorize State prohibition of agency shop agreements.[31]

This is not to say that Section 14(b), or the proviso to Section 8(a)(3), encompasses every agreement requiring employees to make payments to the labor organization which represents them. Some such arrangements, unlike the agency shop, may be wholly outside both provisions. But the agency shop itself, although it does not require an unwilling employee to become a union member in the exact sense of the term, does require such very substantial support of the organization and its objectives as to be a form of "union security" and, conversely, of "compulsory unionism." Under the agency shop the non-member

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[31] See *Higgins* v. *Cardinal Mfg. Co.*, 138 Kan. 11, 306 P. 2d 456, certiorari denied, 368 U.S. 829; *Motor Coach Employees* v. *State Lines* (D. Nev.), 49 LRRM 2732; *Arizona Flame Restaurant, Inc.* v. *Baldwin*, 26 L.C. par. 68, 647 (Ariz., 1953). See also, *Schermerhorn* v. *Local 1625, Retail Clerks*, 141 So. 2d 269, pending on certiorari No. 368, this Term.

pays the full amount of initiation fee and periodic dues. His payments go to defray not only expenses of collective bargaining for which he receives a *quid pro quo*—such as the cost of negotiating contracts, handling grievances and taking cases to arbitration—but also to finance welfare benefits and promote unionization, lobbying and political activity. Thus, while an agency shop agreement may leave a non-member free of what he deems a distasteful personal association, he is nevertheless required to finance the promotion of the union's objectives—objectives that do not benefit him directly and that he may regard as obnoxious, if not an infringement of his personal political liberty. Cf. *International Association of Machinists* v. *Street*, 367 U.S. 740.

Many practical consequences, and therefore perhaps the legal effect, of a contract requiring non-members to pay a fee proportionate to the cost of services given and received are altogether different from incidents of the agency shop. The plainest illustrations are those calling for the payment of specific sums. For example, a union which operates an exclusive hiring hall or job referral system renders to both members and non-members a service which it is expensive to provide, and the union may therefore wish to charge non-members a fee for this service equivalent to their proportionate share of the cost. It would seem plain that such an arrangement is not open to State regulation by Section 14(b) as a form of compulsory unionism. Its legality under the National Labor Relations Act was sustained in *H. J.*

Homan Co., 137 NLRB No. 118, 50 LRRM 1310. To cite another example, arbitration imposes a heavy burden upon a local union. A union might seek to meet the problem by a kind of "insurance"—by requiring each employee who wished to have his future grievances taken to arbitration to contribute a proportionate share of the estimated cost of arbitrating grievances during the ensuing year. If a provision requiring employees to contribute a proportionate share of the estimated costs of arbitrating grievances as a condition of employment were put into a collective bargaining agreement, the scheme would become compulsory, but surely a State could not prohibit the arrangement as a contract requiring membership in a labor organization. And since the arrangement would pertain more to the institutional arrangements for determining terms and conditions of employment than to the substantive terms and conditions, we think it removed from other State control by federal preemption. Cf. Cox, *Federalism in the Law of Labor Relations*, 67 Harvard L. Rev. 1297, 1324.

The question obviously is closer when the service fee covers the cost of more of the benefits that employees in a bargaining unit receive from the union's activities as their representative. With each additional contribution to the cost of some union function the degree of compulsory association becomes more intimate, and it is evident that as refinements develop the question becomes one of drawing a line between fairly clear extremes.

In terms of the avowed objectives of the legislation the line might well be found to fall between the agency shop and a true service fee covering all cost of collective bargaining but not of legislative or political activities. Two of the most severe criticisms of compulsory unionism were that the closed shop restricts the freedom of the employer in hiring the most qualified workers by forcing him to accept a union member, and that some unions were exercising monopoly power by artificially restricting the supply of labor.[32] The amendments outlawing the closed shop as a matter of federal law took care of these objections. A third criticism was that unions used the disciplinary power to expel a member and thus deprive him of his job arbitrarily and in such a way as to curtail personal liberty.[33] These abuses are eliminated by the provision that no employee may be discharged by reason of non-membership if he has tendered the initiation fee and periodic dues. Union security contracts were also deemed objectionable because the employees' dues were used to finance objectives to which some individuals were personally opposed; political support of a candidate opposed by individual union members is the closest illustration. The problem was partially met in the federal sphere by Section 304 of the Labor Management Relations Act, which prohibits any union "contribution or expenditure" in a federal primary or election. That protection, however, is incomplete

[32] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 6–7, 1 Leg. Hist. (1947) 407, 412, 413; H. Rep. No. 245, 80th Cong. 1st Sess., p. 4, 1 Leg. Hist. (1947) 295.

[33] Ibid. See also fn. 16, pp. 24–25.

because it does not apply to lobbying and similar political activity, to contributions in State election campaigns or to expenditures in union organizing drives and similar activities that promote the objectives of the union but yield no direct returns to the individual employee. So far as one can judge from the legislative history, the purpose of Section 14(b) was to enable the States to deal with these problems, as some viewed them, left untouched by federal law. Since none of the alleged faults of compulsory unionism is created by the requirement of a service fee limited to the expenses of collective bargaining, it seems improper to associate a service fee with the compulsory unionism that Section 14(b) was intended to allow the States to prohibit.

On the other hand, if contracts providing for the payment of a service fee as a condition of employment are valid under the national act and immune from State regulation, it must be upon the ground that such an arrangement is wholly outside the area covered by the proviso to Section 8(a)(3) and by Section 14(b), yet does not interfere with rights guaranteed by Section 7 because the payment for consideration received is not assistance or participation in collective bargaining within the meaning of Section 7 and does not encourage or discourage union membership. This conclusion is difficult to reconcile with the widespread congressional assumption that it was necessary to permit union security contracts in order to avoid the unfairness of free riders who accept the benefits of collective bargaining but refuse to pay the expenses. This was

undeniably the dominant rationale of the proviso. A partial explanation may be that in 1947 there were few contracts, if any, that distinguished between a service fee and the full payment of union dues. The question was conceived in broader terms than necessary—whether the full dues might be required or nothing. But the explanation is only partial, and the difficulty remains an obstacle to the proposed interpretation of Section 14(b).

The National Labor Relations Board has had no occasion to rule upon whether a contract requiring payment of a true service fee as a condition of employment is outside the scope of Section 14(b) and otherwise consistent with the policies of the Act. It is also possible that the Court will find it unnecessary to reach a decision in the pending *Schermerhorn* case (*supra,* fn. 31, p. 37) for, as we are informed, the fee required under that contract may be equal to the full union initiation fee and dues. Although it is conceivable that the full initiation fee and dues are used for the direct expenses of collective bargaining and no part for the union's other activities, this would be an unusual allocation of revenue. Consequently, it might be thought advisable, before passing upon the legal issues, to determine the exact character of the payments involved. Having pointed out the consider-

ations, however, our primary concern is to show that a ruling that a contract calling for a true service fee is not subject to State regulation or prevention under Section 14(b) would not require the conclusion that the agency shop is not protected by the proviso to Section 8(a)(3), for on this point the foregoing distinctions seem plainly determinative.

Indeed, the decision below should be reversed even if Section 14(b) is inapplicable to an agency shop. For if the phrase "agreements requiring membership in a labor organization" is to be read with literal exactness instead of as a general description of union security agreements (as we have contended), then the term marks an outside limit—in the one case of State power to regulate and in the other of the employer's and union's freedom of contract. See Brief for American Federation of Labor and Congress of Industrial Organizations, pp. 18–20. In that event, the two areas are not coextensive. The freedom to negotiate an agreement requiring membership as a condition of continued employment would then incorporate permission to negotiate a contract imposing all the lesser included obligations not as restrictive of the freedoms guaranteed by Section 7. But the State's privilege to regulate the more restrictive contracts would not necessarily authorize it to reach further and prohibit less onerous agreements.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to enforce the Board's order.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such em-

ployment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; * * * and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

SEC. 14. (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

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IN THE

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OCTOBER TERM, 1962.

No. 404

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GENERAL MOTORS CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RAYMOND E. LEWIS, BERNICE COX, PAUL B. ATWOOD, R. E. HARRINGTON, CLETUS L. CHITWOOD, EUGENE CATES, LEWIS D. FIELDS, AND JOHN A. MOLDTHAN AS AMICI CURIAE.

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INTEREST OF AMICI CURIAE.

This Brief is submitted in behalf of Raymond E. Lewis, Bernice Cox, Paul B. Atwood, R. E. Harrington, Cletus L. Chitwood, Eugene Cates, Lewis D. Fields, and John A. Moldthan, individually and as representatives of other employees of General Motors Corporation, hereinafter called "Company", who are similarly situated.[1] Each of such persons is an employee of the Company occupying

1. Consents to the filing of this Brief, executed by the Solicitor General and counsel of record for General Motors Corporation, have been filed with the Clerk of this Court.

a position within the collective bargaining unit which would be subject to the agency shop arrangement proposed by the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (AFL-CIO), hereinafter called "Union", in its letter to the Company of October 20, 1959 (R., pp. 54-55, 74, 82, 99-100). Each of such persons is not now a member of the Union; each has no desire to become a member of the Union; and each believes that the forced payment of sums under the proposed agency shop provision would be an infringement of his individual liberties. Further, several hundred other employees of the Company within such collective bargaining unit are not members of the Union, have no desire to become members of the Union, and are opposed to the infringement of liberties involved in the involuntary payment of agency shop fees.

Under the provisions of Sections 7, 8(a) (1), and 8(a) (3) of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519), each of such persons is entitled to be free from interference, restraint, or coercion by the Company or the Union or any other labor organization with regard to his right to refrain from assisting the Union or any labor organization. Each of such persons is entitled to be free from any discrimination with regard to hire and tenure of employment which in any way would require him or other employees to assist the Union in any manner whatsoever.

The agency shop agreement proposed by the Union would require the *amici curiae* and all other employees of the Company similarly situated to assist the Union upon penalty of being discharged, in violation of their rights under Sections 7, 8(a) (1) and 8(a) (3) of the Labor Management Relations Act, as amended. Therefore, each of such persons has a direct interest in this litigation.

SUMMARY OF ARGUMENT.

Section 7 of the Taft-Hartley Act grants employees the right to assist or refrain from assisting labor organizations. The only exception to this right is contained in the first proviso of Section 8(a) (3), which provides that certain arrangements requiring membership may be agreed to by unions and employers in derogation of the rights granted to employees by Section 7. For purposes of this proceeding, the scope of the proviso is denoted by the term "membership" and does not include union security arrangements requiring something other than membership. The various common forms of union security do require membership and Congress carefully employed a generally understood term.

This Court should adhere to its frequently stated rules of statutory construction (1) that unambiguous language should be interpreted according to its clear meaning without resort to legislative history or public policy which are often themselves ambiguous, (2) that matters not clearly excepted from a statutory right are within such right, and (3) that provisos limiting the grant of rights should be strictly construed. The application of these rules to Section 7 and the first proviso of Section 8(a) (3) strongly suggest that the term "membership" in such proviso means membership within the meaning of the constitution and by-laws of the particular labor organization and that the grant of employee rights contained in Section 7 is limited only by union security arrangements requiring actual membership.

The legislative history of the Taft-Hartley Act, although not without ambiguity, tends to establish that Congress in-

tended "membership" in the first proviso of Section 8(a) (3) to have its common, ordinary meaning. The legislative history of the Wagner Act and cases decided thereunder are not pertinent since the statutory right of employees to refrain from assisting labor organizations contained in Section 7 of the Taft-Hartley Act did not exist at that time. The statements of Senator Taft made in debate upon the first proviso of Section 8(a) (3) support the conclusion that "membership" is used in its normal sense.

Even if Congress intended the proviso to prevent "free riding" by those who are said to secure the benefit of union representation without paying their proportionate share of the cost of such representation, the agency shop agreement proposed by the Union would not be within this Congressional intent because it would require employees who are not union members to pay for benefits which they do not receive. Since Congress was aware of other union security measures than those requiring membership at the time of the debates upon the Taft-Hartley bill, the fact that "membership" is used in the first proviso of Section 8(a) (3) should be interpreted as a judgment by Congress that union security provisions not requiring membership should be unlawful.

The agency shop arrangement proposed by the Union should be judged by itself. It does not obtain validity by being associated in the alternative with valid union security provisions. Moreover, in states such as Indiana in which Right-To-Work Laws have been enacted outlawing union shop contracts, no such association would be possible.

The agency shop suggested by the Union is more onerous, not less onerous than the union shop. It is not a lesser form of union security since it requires nonmembers to pay for benefits which they do not obtain.

The second proviso of Section 8(a) (3) does not constitute a definition of "membership". It limits the exception contained in the first proviso because otherwise a union security arrangement requiring membership would be valid even if membership were not open to all employees. The term "membership" in the first proviso denotes actual membership in accordance with the constitution and by-laws of the particular labor organization and nothing more.

ARGUMENT.

SECTIONS 7, 8(a)(1), AND 8(a)(3) OF THE ACT PROHIBIT ALL TYPES OF UNION SECURITY PROVISIONS EXCEPT THOSE REQUIRING UNION MEMBERSHIP.

Section 7 of the National Labor Relations Act, as amended, grants employees "the right to * * * assist labor organizations * * * and to engage in other concerted activities * * * and * * * also the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a) (3)" (61 Stat. 136, 73 Stat. 519).

The statutory right to refrain from assisting labor organizations did not exist prior to the enactment of the Taft-Hartley Act. The primary concern of Congress in enacting this legislation was the protection of the individual rights of employees. *Radio Officers' Union* v. *N. L. R. B.*[2]

Section 7 and Section 8(a) (1) undertake to define and establish the rights of individual employees *vis-a-vis* the rights and duties of labor organizations and employers. These provisions indicate that the rights of individual employees are paramount in the fundamental scheme of the Taft-Hartley Act.

The *amici curiae* recognize, of course, that their right to refrain from assisting a labor organization is limited to the extent specified in the first proviso of Section 8(a) (3). This proviso states, "That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of em-

2. 347 U. S. 21 (1954).

ployment membership therein on or after the thirtieth day following the beginning of such employment . . . " (61 Stat. 136).

The Union's proposal to the Company is not that the *amici curiae* and all other employees in the bargaining unit be required to obtain membership in the Union as a condition of employment. It is that all such employees be subject to discharge unless they pay a monetary fee to the Union although they are not members of the Union. The right of the *amici curiae* and other employees who are not members of the Union to refrain from assisting such organization cannot be limited by requiring them to pay a fee to such organization.

The right granted in Section 7 to refrain from assisting any labor organization is absolute, except as limited by the first proviso of Section 8(a) (3). The one exception contained in this proviso pertains to union security arrangements requiring membership. "Membership" is not an obscure, technical word. It is not one with a special meaning in the labor-management field. There is no reason not to apply its common, every-day meaning.

The Union recognized the difference between membership and nonmembership in the drafting of the proposed agency shop agreement submitted to the Company. Paragraph (b) of such agreement states: "Membership in the Union is separate, apart and distinct from the assumption by one of his equal obligation to the extent that he receives equal benefit" (R., pp. 54-55). The Union thus admits that the proposed agency shop provision does not require "membership". Since only union security arrangements requiring membership are referred to in the first proviso of Section 8(a) (3) and since only union security arrangements described in the first proviso of Section 8(a) (3) are excepted from the general grant of rights to employees

contained in Section 7 of the Act, the Union's proposed agency shop agreement is in violation of the rights conferred by Section 7, there being no contention that contributing financial support to a labor organization is not "assisting" such labor organization.

(1) The Statutory Scheme Permitting Only a Membership Requirement Is Reasonable.

In enacting the 1947 Amendments to the Act, Congress thoroughly studied and considered all Sections of the Act and developed an over-all statutory scheme which permitted certain things and prohibited certain things. This statutory scheme was not the chance result of careless use of words, but rather was the product of deliberate and even painstaking consideration, word for word, of the language to be employed in the statute. The term "membership" used in the first proviso to Section 8(a) (3) and used again in the Section 14(b) provision saving prohibitory state legislation was deliberately employed and clearly understood by all who participated in the legislative process.

Not only was the term "membership" deliberately employed by an informed Congress, but the term was also reasonably employed to mean precisely what it is understood to mean. At the time the 1947 Taft-Hartley Amendments were enacted there were four types of union security clauses commonly appearing in collective bargaining agreements. These types were the following:

(1) *Closed Shop*– The closed shop contract clause requires union "membership" from an applicant for employment before he can be hired (This union security arrangement was made illegal by the 1947 Amendments).

(2) *The Union Shop*—This contract clause requires "membership" of all employees by the end of a stated time limit after initial employment.

(3) *The Modified Union Shop*—This contract clause requires "membership" in the union from all employees belonging to the union on a stated date and all employees thereafter hired, but it exempts present non-member employees from the "membership" requirement of the clause.

(4) *Maintenance of Membership*—This contract clause requires "membership" of those employees who have voluntarily become members of the union as of a stated date, but it exempts other employees from the membership requirement.

The four types of union security arrangements listed above are all of the types of union security arrangements commonly or even frequently appearing in collective bargaining agreements at the time the 1947 Amendments were enacted. These clauses have one outstanding feature in common, *i.e.*, they require "membership" of certain employees. The only variation between the different clauses is in the definition of the group of employees to whom the requirement of "membership" is applicable.

Congress enacted specific legislation which secured certain rights to employees, including the right to refrain from assisting a labor organization and the right to be free from interference, restraint or coercion in regard to that right. Congress provided an exception to the general prohibition by which employers and unions under certain circumstances are permitted to enter into an agreement requiring "membership". This exception appears in the first proviso of Section 8(a) (3); and the term "membership" there employed was deliberately use to be inclusive of the forms of union security commonly appearing in collective bargaining agreements. Congress' use of the term was logical, it was reasonable, and it was inclusive of the various contractual arrangements which require an employee to become a member of a labor organization.

The "agency shop" arrangement was virtually unknown at the time of the 1947 Amendments to the Act. The device of requiring a non-member employee to pay money to a union as a condition of employment has had little or no favor among unions and managements except to the extent that it has been recently employed in an effort to circumvent state laws in states like Indiana which prohibit contract clauses requiring union membership.[3] In light of these facts, it cannot be reasonably said that Congress intended to permit such a contractual device, which the language it employed clearly prohibits, in order that unions and companies may be permitted to infringe upon individual employee rights in a Right-to-Work state.

The fact that Congress intended to prohibit any type of arrangement which it did not permit by the first proviso of Section 8(a)(3) does not need belaboring. Congress considered its wording carefully and it developed a reasonable statutory scheme of regulation. All the various forms of union security requiring "membership" are permitted under appropriate circumstances and all other discrimination in regard to or interference with the right of employees to refrain from assisting a labor organization are prohibited.

(2) Unambiguous Words of a Statute Should Be Construed According to Their Clear Meaning.

This Court has frequently held that clear and unambiguous statutory language precludes the interpretation of such language based upon legislative history or public policy which are themselves almost always ambiguous.

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3. A survey by the Bureau of National Affairs shows that as few as 1% of collective bargaining agreements contained "agency shop" clauses in 1957 when the Indiana Right-to-Work statute was enacted. 46 L. R. R. M. 14, 18 (1961).

Local 1976 v. *N. L. R. B.*[4]; *Flora* v. *United States*[5]; *N. L. R. B.* v. *Coca-Cola Bottling Co.*[6]; *Yates* v. *United States*[7]; *Unexcelled Chemical Corp.* v. *United States.*[8]

In *Unexcelled Chemical Corp.* v. *United States, supra,* this Court said:

> "It is not for us then to try to avoid the conclusion that Congress did not mean what it said. Arguments of policy are relevant when for example a statute has an hiatus that must be filled or there are ambignities in the legislative language that must be resolved. But when Congress, though perhaps mistakenly or inadvertently, has used language which plainly brings a subject matter into a statute, its word is final—save for questions of constitutional power which have not even been intimated here." (345 U. S. at 64.)

Section 7 of the Act gives employees the freedom to assist labor organizations or not to assist labor organizations, whichever course they should choose to follow. Section 8(a)(1) and Section 8(a)(3) declare that it is an unfair labor practice for an employer to interfere with such freedom. The one exception to the declaration of rights found in Section 7 and the implementation of such rights contained in Sections 8(a)(1) and 8(a)(3) is that, under certain conditions, an employer may enter into a contract with a union providing that membership in such organization is a condition of employment.

The language which Congress used in limiting the right to refrain from assisting a labor organization is unambiguous. It permits an employer and a union to require membership in the union, under certain circumstances, as a

4. 357 U. S. 93 (1958).
5. 357 U. S. 63 (1958).
6. 350 U. S. 264 (1956).
7. 354 U. S. 298 (1957).
8. 345 U. S. 60 (1953).

condition of employment. The exception is only as broad as the word "membership".

In *N. L. R. B.* v. *Coca-Cola Bottling Co., supra*, this Court was called upon to construe the term "officer" as used in Section 9(h) of the Labor Management Relations Act, as amended. The employer had been charged with violation of Sections 8(a)(1) and 8(a)(3) of the Act. At the hearing before the National Labor Relations Board, the employer challenged the jurisdiction of the Board upon the ground that the Regional Director of the complaining union had not filed a non-communist affidavit which Section 9(h) required of each "officer" of the union. The Board rejected this contention on the ground, among others, that the employer's allegations, if true, did not establish that the Regional Director was an "officer" of the union, the Board proceeding on the theory that a union "officer" was a person occupying a position identified as an office in the union's constitution. The Sixth Circuit Court of Appeals remanded the case to the Board for determination of whether the Regional Director's functions constituted him an "officer", although he was not designated as such in the union's constitution.

In an opinion by Mr. Justice Frankfurter, this Court unanimously held that the Board had properly construed the term "officer" used in Section 9(h), saying:

> "Neither § 9(h) itself nor its legislative history attempts a definition of 'officers.' 'Officers' is a word of familiar usage and '(a)fter all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.' • • • 'Officers' normally means those who hold defined offices. It does not mean the boys in the back room or other agencies of invisible government, whether in politics or in the trade-union movement.

> A definition of officer as 'any person occupying a position identified as an office in the constitution of the labor organization' accords with this lay understanding." (350 U. S. at 268-269.)

The word "membership" to be defined in this proceeding and the term "officer" construed by this Court in the *Coca-Cola Bottling Co.* case both relate to the internal organization of a labor union. Just as the constitution of a labor organization defines who its officers are, so the same constitution determines what employees are members. Both words have meaning only with respect to a given labor union, and both denote those persons and only those persons whom the laws of such organization designate.

The term "membership" does not have a special or unique meaning in the field of labor relations. A member of a union is a person who has been admitted to its membership according to its constitution and by-laws. No employee would think otherwise; no employer would think otherwise, and it is implausible to think the Congress intended any other meaning.

As stated by Mr. Justice Frankfurter in *Coca-Cola Bottling Co.*, legislation when not expressed in technical terms is directed to the ordinary person. The meaning to be given to its language is that which the common run of man would attribute to it. The first proviso in Section 8(a)(3) is clear and unambiguous and precludes resort to legislative history for interpretation.

indicate that the term "membership" in Section 7 and Section 8(a)(3) was not intended by Congress to authorize any different union security device than compulsory union membership.[12]

Both the Solicitor General and the Union place some emphasis in their briefs upon the legislative history of the Wagner Act and cases decided thereunder. Neither such history nor such cases are in point. The statutory right of employees to refrain from assisting a labor organization came into existence with the enactment of the Taft-Hartley Act. Prior to that time no such statutory right existed. Congressional debate and decisions pertaining to the scope of the first proviso of Section 8(a)(3), as contained in the Wagner Act, are not helpful when the general rule to which the proviso now applies was not then in existence.

The Solicitor General and the Union construe a statement made by Senator Taft on the floor of the Senate as analogizing the provisions of the first and second provisos of Section 8(a)(3) to the form of agency shop which has been adopted in Canada. The Senator's remarks not only do not bear this construction, but instead support the conclusion that agency shop arrangements were excluded by Congress from the first proviso of Section 8(a)(3). Senator Taft concluded the remarks referred to in the Solicitor General's and Union's Briefs by saying:

> "If he pays the dues without joining the union, he has the right to be employed. That, in effect, is a kind of tax, if you please, for union support, if the union is the recognized bargaining agent for all the men, but there is no constitutional way by which we can do that in the United States" 93 Cong. Rec. 5088.

Although stating that the end result of the two provisos of Section 8(a)(3) is similar to the state of affairs in

12. 2 Leg. Hist. (1947), 295, 300, 409; 93 Cong. Rec. 1623, 3612-3620, 3952, 3953, 4152, 4262, 4412, 5137, and 5147.

Canada, the Senator made it clear upon the Record that the provisos of Section 8(a)(3) do not permit an agency shop agreement as did the Canadian statute. To authorize such, the Senator thought, would be unconstitutional. The Senator's statement constitutes a positive declaration that the proviso of Section 8(a)(3) permitting a contractual requirement of membership was intended to permit precisely that and was not intended to permit any requirement of a money payment from a non-member.

The Solicitor General and the Union suggest in their Briefs that the members of Congress were chiefly occupied with the elimination of "free riders" in their debates upon the Taft-Hartley Act. It is argued that the first proviso of Section 8(a)(3) was intended to permit all arrangements eliminating so-called "free riders" except the closed shop. If Congress was preoccupied with any one factor during the debates upon the Taft-Hartley Act, it was the protection of the right of individual employees to assist or refrain from assisting labor organizations in any way. Any consideration of alleged "free riders" was certainly secondary.

Even if the function of the first proviso of Section 8(a)(3) were to require employees, by whatever arrangement labor organizations and employers should decide, to pay their proportionate share of the cost of the representation afforded them by such labor organizations, the agency shop agreement which the Union has proposed to the Company would not qualify for such exception. The provision goes much further than the proviso would permit even when so broadly construed. As the Solicitor General stated in his Brief:

> "Under the agency shop, the non-member pays the full amount of initiation fee and periodic dues. His payments go to defray not only expenses of collective bargaining for which he receives a *quid pro quo*—such as

> the cost of negotiating contracts, handling grievances and taking cases to arbitration—but also to finance welfare benefits and promote unionization, lobbying and political activity. Thus, while an agency shop agreement may leave a non-member free of what he deems a distasteful personal association, he is nevertheless required to finance the promotion of the union's objectives—objectives that do not benefit him directly and that he may regard as obnoxious, if not an infringement of his personal political liberty." Solicitor General's Brief, pp. 37-38.

The effect of the agency shop proposed by the Union is to permit the Union to free ride on the *amici curiae* and other employees similarly situated rather than vice versa.

The Solicitor General states at page 26 of his Brief that, "Congress was aware that there were arrangements less restrictive than the union shop by which unions had apportioned the costs of representation among the employees in the bargaining unit, and in singling out the union shop it had no intention to preclude them." The Solicitor General is correct in his statement that Congress was aware of other forms of union security than the union shop. However the conclusion he draws from this fact ignores the language which Congress employed in expressing its intent. The fact that Congress was cognizant of the agency shop and nevertheless limited the union security arrangements made permissible by the first proviso of Section 8(a)(3) to those requiring "membership" argues strongly for the fact that Congress intended to exclude from this exception all forms of union security not requiring membership.

The legislative history of the Taft-Hartley Act, although not without ambiguity, tends to establish that Congress meant "membership" to have its common, ordinary, everyday meaning, that "membership" should denote the holding of membership in accordance with the constitution and

by-laws of the particular labor organization. Certainly, nothing in the legislative history establishes the contrary position.

(6) The Provisions of Section 14(b) and of Section 8(a)(3) Are Interrelated.

Congress used the term "membership" in Section 8(a)(3) and again in Section 14(b) as interrelated parts of an over-all scheme of statutory regulation. Congress was aware that many states had statutes prohibiting various forms of union security appearing in collective bargaining agreements, and Congress wished to leave this state legislation undisturbed and also wished to negate any inference that the proviso to Section 8(a)(3) was to be construed as pre-empting such state legislation or any similar future state enactments. The logic of the situation required the use of the same term "membership" in Section 14(b) as had appeared in the proviso of Section 8(a)(3). Congress intended to permit the states to prohibit those clauses which the proviso of Section 8(a)(3) would permit. Congress had no need to permit the states to prohibit any different arrangements which stood prohibited by the general provisions of the Act, including Sections 7, 8(a)(1), and 8(a)(3).

Congress manifest a clear intent to permit the various contractual arrangements requiring "membership" as a condition of employment as a limitation upon the right of an employee to refrain from assisting a labor organization. Congress also intended that the states should be free to outlaw such arrangements if they saw fit. Certainly, it is unreasonable to imply from these statutory provisions any Congressional intent that contractural clauses requiring something other than membership should be permitted in states which have availed themselves of the Congressional permission to outlaw the membership requirement.

The Congressional intent is set forth clearly in unambiguous language in an overall statutory scheme of regulation which is reasonable, which is consistent, and which clearly delineates the permissible area of individual rights, management rights, union rights and of state regulation. The entire scheme was carefully and logically worked out, and it should be interpreted and applied precisely as Congress stated and precisely as Congress intended it to operate.

(7) An Agency Shop Agreement Is Not Made Valid by the Fact That It Is Coupled in the Alternative With a Union Shop Provision.

Both the Solicitor General and the Union suggest that the agency shop agreement proposed by the Union is valid under the first proviso of Section 8(a)(3) because it may be joined as an alternative with a union shop provision which is clearly valid under such proviso. This is an inversion of the guilt by association fallacy. The validity of an agency shop provision is determined by whether it is included in the first proviso of Section 8(a)(3). If it is included in that proviso, it is valid; if it is not, it is invalid. The agency shop must be judged by itself and does not obtain validity by being associated with an admittedly valid form of union security.

Furthermore, the *amici curiae* and all employees of General Motors similarly situated in Indiana and all employees in states in which Right-to-Work laws outlawing union shops have been enacted and interpreted as allowing agency shops do not have the choice upon which the Solicitor General and the Union place so much emphasis. In Indiana the union shop is made illegal by statute.[13] Agency shop provisions therefore cannot be joined in Indiana with union

13. Burns Ind. Stat. Ann. (1962 Cumm. Pocket Supp.), Sec. 40-2701, *et seq.*

shop requirements to obtain the validity by association which the Solicitor General and the Union contend they would otherwise have.

(8) The Agency Shop Is Not a Lesser Form of Union Security Included in the Term "Membership".

The Solicitor General and the Union also contend that the proposed agency shop arrangement is included as a lesser form of union security in the first proviso of Section 8(a)(3). This contention ignores the language which Congress employed in the proviso and the fact that Congress was aware of various forms of union security provisions but described only those requiring "membership." This argument also does not take into consideration the fact that the right to refrain from assisting labor organizations did not exist prior to the enactment of the Taft-Hartley Act and the fact that the scope of the first proviso of Section 8(a)(3) must be determined in the context of this new right, not the situation existing prior to the creation of such right. Congress's grant of the right to refrain from assisting labor organizations eliminates any argument which could be made under the Wagner Act that so-called lesser types of union security were included in the first proviso of Section 8(a)(3).

The agency shop proposed by the Union is not a lesser form of union security. It requires employees who are not members to contribute to the support of the Union to the same extent as members, but would not permit such employees to have the right to attend union meetings, to vote upon the ratification of collective bargaining agreements negotiated by the union, or to participate in union intra-organizational affairs (R. pp. 86-87, 92). Furthermore, it would require non-members ont only to defray the expenses of collective bargaining, but also to finance organizational

efforts, political activity, and other union objectives which do not benefit them directly and which they may consider repugnant. The proposed agency shop provision would require those employees who do not desire to join the Union to pay the same monies but receive fewer benefits than members of the Union. Rather than being less onerous, the agency shop agreement is more onerous.

The Solicitor General and the Union contend that unless an agency shop contract is within the purview of the first proviso of Section 8(a)(3), employees will be able to obtain the benefits of union representation without paying their proportionate share of the cost of such representation. This contention ignores the fact that the proposed agency shop contract would require the *amici curiae* and other employees similarly situated to pay not only their proportionate share of the expense of collective bargaining but also a share of other activities of the union which benefit only members.

Neither the Solicitor General nor the Union has advanced any valid reason for construing the term "membership" in the first proviso of Section 8(a)(3) as including the agency shop arrangement proposed by the Union, even if such construction were one of several possible under applicable rules of statutory construction.

(9) The Second Proviso of Section 8(a)(3) Does Not Make the Union Security Provisions Described in the First Proviso Analogous to Agency Shop Arrangements.

The second proviso does not constitute a definition of the term "membership" as used in the first proviso. It is a further limitation upon the permissible action of companies and unions. In placing the second proviso in Section 8(a)(3), Congress recognized that membership in a labor organization is a specific status having a precise

and recognized meaning and that if no further limitation of action were placed upon the parties, they would be free to do as they saw fit in regard to the requirement of membership. Congress chose to place these two limitations upon the freedom of an employer and a labor organization to require membership in the labor organization by contract. Nothing more was intended.

Conclusion.

For the foregoing reasons the judgment of the court below should be sustained.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 404

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
GENERAL MOTORS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR GENERAL MOTORS CORPORATION

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BRIEF FOR GENERAL MOTORS CORPORATION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 111-115) is reported at 303 F. 2d 428. The original Decision and Order of the National Labor Relations Board (R. 10-52) is reported at 130 NLRB 481, and the Board's Supplemental Decision and Order vacating the original Decision (R. 53-73), is reported at 133 NLRB 451.

JURISDICTION

The Court of Appeals rendered its opinion on June 8, 1962 (R. 111-115) and entered a judgment and decree on the same date (R. 110). This Court, upon the petition of the Solicitor General of the United States, filed on September 4, 1962, granted certiorari on November 19, 1962 (R. 116; 371 U.S. 908). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136; 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are as follows:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statutes of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, * * *."

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether an employer is guilty of a refusal to bargain in violation of the National Labor Relations Act, as amended, where he admittedly has declined to discuss with a labor organization which is the bargaining agent for the employer's employes a proposal by that labor organization that the employer enter into an agreement which would condition the continued employment of each employe of the employer who was not a member of the labor organization upon the payment to the labor organization by each such employe of a sum of money specified by the labor organization to be the equivalent of the initiation fee and periodic dues paid by members of such labor organization.

COUNTER-STATEMENT OF CASE

A. The Board's Relevant Factual Conclusions and Other Relevant Undisputed Facts

General Motors Corporation (hereinafter throughout referred to either as "General Motors" or "Company"), at all times relevant to the proceedings in this cause, had a three-year national collective bargaining agreement (Footnote 2; R. 54) with the International Union, UAW, AFL-CIO (hereinafter throughout referred to either as the "UAW" or "Union"), which was entered into under date of October 2, 1958.

This agreement contained a provision making membership in the UAW a condition of continued employment for all employes covered by the agreement. However, the agreement also contained language which made this membership requirement inoperative in any state "which prohibits or otherwise makes unlawful membership in a labor organization as a condition of employment" (Footnote 2; R. 54). Indiana has a law containing such a statutory prohibition and restraint (Footnote 4; R. 55). As a consequence, the UAW recognized that the "membership as a condition of continued employment" requirement of the aforementioned collective bargaining agreement could not be made operative with respect to those General Motors employes in Indiana plants who were represented by the UAW and who were otherwise covered by that agreement (R. 80).

On October 20, 1959, the Union proposed in writing that General Motors enter into a supplementary agreement which would have required "as a condition of continued employment" that all General Motors employes in Indiana,

who could not be compelled to become and remain members of the Union by reason of the aforementioned provision of the October 2, 1958 Agreement and the cited Indiana Statute, "pay to the UAW a sum equal to the initiation fee charged at each of our local unions involved and monthly sums equal to the regular dues required of our members at each location" (R. 100).

General Motors in a written response to the UAW dated October 27, 1959 stated that because an "agency shop arrangement * * * as * * * detailed in your letter of October 20, 1959 would violate the National Labor Relations Act, as amended, if incorporated in a collective bargaining agreement, we respectfully decline to comply with your request" (R. 103).

Thereafter, the UAW filed unfair labor practice charges against General Motors with the National Labor Relations Board alleging an unlawful refusal to bargain with respect to its October 20, 1959 "agency shop" proposal. Following an investigation, a formal complaint based upon the charges was issued against General Motors by the National Labor Relations Board.

At the hearing before the Trial Examiner, General Motors introduced into evidence the Union's Constitution and called the Union's Vice President in charge of its General Motors department as a witness. He testified with respect to the operation of the Union's Constitution and explained the rights of members and the rights, if any, of non-members thereunder who would be required to pay the fee fixed in the Union's proposal. Such of the witness' testimony as is relevant to the resolution of the issue presented is undisputed (R. 77-93).

In substance, the witness testified that, while non-members under the proposed "agency shop" would be obligated

to pay an amount equivalent to the initiation fee and monthly dues that are required of members of the Union, the Union's Constitution guarantees such non-members none of the rights or privileges to which members are entitled (R. 82-92).

Thus, "agency shop" non-members would not be eligible or permitted to vote on ratification of agreements entered into or negotiated by the Union on their behalf (R. 86; 90-91) or to vote on how any of their support money would be allocated within the Union (R. 92). Likewise, they would not be entitled as a matter of right to receive the Union's publication "Solidarity" without the payment of an additional fee, although this same publication is made available to members upon their payment of monthly dues (R. 87-88). Nor would non-members have any guarantee that their payments would entitle them to strike benefits, participation in the Union's Educational Fund or to any of the other benefits guaranteed Union members (R. 89-90; 92). The witness in fact pointed out that "our constitution isn't written in terms of non-members" but "• • • is written in the sense of membership" (R. 90).

On February 20, 1961, a majority of the National Labor Relations Board in a 3-to-2 decision (R. 10-52) reached the conclusion that the "agency shop" proposal, concerning which General Motors declined to bargain, was illegal under the National Labor Relations Act, as amended, and further concluded that General Motors had not violated the law by refusing to bargain with the UAW concerning it (R. 19; 37; 41).

On September 29, 1961, less than eight months later, following the filing of Motions for Reconsideration by the General Counsel of the National Labor Relations Board and by counsel for the UAW, a reconstituted Board having two new members set aside that decision and, in a 4 to 1

Supplemental Decision and Order (R. 53-73), concluded that the "agency shop" was not illegal under the National Labor Relations Act, as amended (R. 66). It also ordered General Motors, among other things, to bargain with the UAW concerning its "agency shop" proposal made to General Motors on October 20, 1959 (R. 100).

B. The Board's Erroneous Conclusion

In its Supplemental Decision and Order, the Board also concluded that:

> "The Union sought to bargain concerning a clause which would leave the final decision as to membership or nonmembership with each individual employee, *at his option*, but nevertheless, to condition employment upon the payment of sums of money which would constitute each employee's share of financial support." (R. 66.)

Attention is directed to the above-quoted erroneous conclusion at this point because Petitioner's principal argument herein is premised upon the existence of an "option" in the UAW's proposal to General Motors. As will be demonstrated in the "Argument" hereinafter, this "option" argument must necessarily fail when examined both in light of the facts as they appear from the evidence and testimony in the Record and the legal context in which the Union's proposal arose.

C. The Decision of the Court of Appeals

General Motors asked the Court of Appeals for the Sixth Circuit to review the Board's Supplemental Decision and Order. That Court, in a unanimous opinion rendered

on June 8, 1962 (R. 111-115), set aside the Board's Supplemental Decision and Order and denied the Board's request for enforcement (R. 110), saying, among other things:

> "We think the provisions of the Act are clear and unambiguous and need no judicial construction. The language of Section 7 of the Act * * * means what it says and excepts from the operation of the law only agreements requiring membership in a labor organization. * * * An employee involuntarily subjected to the 'agency shop arrangement,' as a condition of his employment, is not a Union member or the equivalent of it. If Congress intended to permit the exaction of these types of charges in lieu of Union membership, as a condition of employment, it could easily have so provided in apt language. It is not for us, under the guise of construction, to enlarge the clear language of this statute. In our opinion, the provision for an 'agency shop' would violate Section 7 and Sections 8(a)(1) and (3) of the Act as this type of arrangement is not excepted from the Act. The employer was therefore not required to bargain with respect to a proposal which was in violation of the Act." (R. 114-115.)

The particular illegal "agency shop" proposal which the Court of Appeals had before it and with respect to which it concluded General Motors had no obligation to bargain (R. 111-115) was that set forth in the UAW's written bargaining demand to General Motors on October 20, 1959 (R. 100).

SUMMARY OF ARGUMENT

The "option" which the Petitioner asserts exists in, and establishes the legality of, the "agency shop" proposal to General Motors is a fiction. An option, if one could be read

into such proposal, would be a sham and afford employes at most a meaningless choice as a matter of law under the facts and circumstances of this case.

The "agency shop" proposal made by the UAW to General Motors, and with respect to which General Motors refused to bargain, fails to comport with, and is illegal under, the provisions of Section 7 and Section 8(a)(3) of the National Labor Relations Act, as amended.

The exercise by employes of their rights under Section 7 of the Act, as amended in 1947, and particularly the right to refrain from assisting a labor organization can be limited only by an agreement requiring union membership as authorized in Section 8(a)(3).

The proposal made by the UAW did not condition continued employment of General Motors employes who were not members of that labor organization upon "membership" therein but rather upon the payment to the UAW of a sum of money which was fixed at the equivalent of the initiation fee and periodic dues required of UAW members. Such an arrangement does not comport with the main clause and first proviso of Section 8(a)(3), and adoption of the arrangement would interfere with the exercise of rights guaranteed in Section 7 and would, therefore, constitute a violation of Section 8(a)(1).

The second proviso of Section 8(a)(3) is inapplicable to the facts herein and, as a consequence, affords no protective cloak for the Union's illegal proposal.

The language of the statute is clear and unambiguous, and the Court of Appeals' adoption and application of the literal language of the statute does not bring about an absurd, offensive, or otherwise legally objectionable result but, to the contrary, carries out the purpose of the Act to

protect the rights, privileges, and interests of individual workers.

The Company, being relieved as a matter of law from bargaining with respect to a proposal which, because of its objective, was illegal, did not refuse to bargain collectively in violation of the National Labor Relations Act, as amended.

ARGUMENT

A. THE UNION'S "AGENCY SHOP" PROPOSAL WITH RESPECT TO WHICH GENERAL MOTORS DECLINED TO BARGAIN DID NOT CONTAIN AN "OPTION". THE RECORD DEMONSTRATES THAT AN "OPTION" WAS NOT INTENDED. IN ANY EVENT, AN "OPTION", SUCH AS THAT WHICH THE PETITIONER URGES, WOULD BE MEANINGLESS AND INVALID AS A MATTER OF LAW.

The argument advanced and developed by Petitioner in support of the alleged legality of the "agency shop" under the amended National Labor Relations Act, as represented by the bargaining proposal made by the Union to the Company, is grounded upon the false and erroneous premise that such proposal contains an "option" which would be available to the employes covered thereby. Accuracy demands that this incorrect and misleading characterization of the Union's proposal be put to rest once and for all in order that this Court may know precisely the nature of the proposal which it is being asked to review.

What was the "agency shop" proposal made by the Union to the Company?

In its letter of October 20, 1959, the Union sought an agreement from the Company which would require "as

a condition of continued employment" that all employes not already members of the Union, and new employes hired thereafter at the employer's Indiana locations, must pay to the Union within thirty days after the agreement, or of their initial employment, whichever is later, "a sum equal to the initiation fee charged" members of each of the Union's locals and "monthly sums equal to the regular dues required" of its locals' "members at each location" (R. 100).

This was the same proposal which the Court of Appeals concluded the Union had made to General Motors (R. 111). Too, the proposal was the same as the one which the National Labor Relations Board concluded the UAW had made in its October 20, 1959 written bargaining request to the Company (R. 54).

The Company regarded this as the only proposal concerning which it had been asked to bargain. It made this abundantly clear to the Union on October 27, 1959, in writing, when it advised the Union that it declined to comply with its request to bargain concerning the "agency shop" arrangement "*as * * * detailed in your letter of October 20, 1959 * * **" (R. 103). (Emphasis supplied.)

The Record does not reveal or support a conclusion that the Union at any time intended, or claimed, its "agency shop" proposal was other than as specified by the language of its letter of October 20, 1959 to the Company.

At the unfair labor practice hearing before the Board's Trial Examiner, following the issuance of the complaint against the Company because of its unwillingness to discuss the UAW's "agency shop" proposal, the Vice President of the UAW, who had affixed his name to the letter containing the specific "agency shop" proposal made to the Company, was examined extensively concerning it (R. 81-93).

He acknowledged familiarity with the proposal (R. 81). During the course of the examination of this witness by counsel for the Company, the Trial Examiner, after having asked for and examined the letter of October 20, 1959 in which the Union's "agency shop" proposal was set forth, stated:

> "Trial Examiner: I just want to be sure what issue I have before me. I just want that to be clear. The only one I have before me is the proposal in that letter, is that correct?" (A. 83)

In answer to the Trial Examiner's question, counsel for the Union replied:

> "Mr. Cranefield: That's correct. * * *" (R. 83)

When the Union's Vice President was asked by counsel for General Motors as to whether the UAW's proposal was "intended to be the same as the agency shop covered by the decision in the Meade case referred to" in the Union's letter of October 20, 1959, counsel for the Union objected to the question because the letter "and the proposal therein contained speaks for itself" (R. 93). The objection was sustained. Thereafter counsel for the Union, evidencing a desire to "sharpen the issue here, * * *" informed the Trial Examiner "* * * that our proposal embodies every essential substantive element of an agency-shop agreement * * *" (R. 93).

All of the foregoing demonstrates (1) that there is nothing in the language of the Union's proposal *itself* which either states specifically or creates any inference that the Union intended that a non-member of the Union was to have an "option" of either joining the Union or of paying an "agency shop" fee as a condition of continued employment with the Company and (2) that if there had been any such intention on the part of the Union, either

by the specific words used in its proposal or otherwise, such intention was completely negated by the testimony of its Vice President, who had conveyed the proposal to the Company, and by the Union's counsel. Together they established on the Record that the proposal spoke for itself and that it contained every essential substantive element of an "agency shop" agreement.

Only a passing statement by the Union's witness and a conclusion expressed by the Board in its Supplemental Decision and Order provide a possible basis for the Petitioner's specious "option" argument. An examination of this statement and this conclusion reveal that neither contains any substance which will support the "option" thesis.

First, during the course of his examination concerning the Union's "agency shop" proposal to the Company, the Union's Vice President indicated that he thought the proposal "would require the payment of a service fee from those who chose not to be members, * * *" (R. 82). This testimony promptly caught the attention of the Trial Examiner who, after asking for and examining the letter of October 20, 1959 in which the witness had made the Union's "agency shop" proposal, said: "The reason I asked for the exhibit, the witness used a term that I didn't think was in the exhibit, and I don't see it in there. 'Service fees from those who chose not to be members.' I didn't recall anything in there that gave them a choice" (R. 83).

Apparently disturbed by the Trial Examiner's observation, and presumably to make certain that the Trial Examiner did not read some non-existent words into the Union's proposal, and also to make certain that the Trial Examiner clearly understood the witness' testimony, counsel for the Union immediately stated, "If I may be permitted, Mr. Examiner, I would suggest that *neither you nor the Board ought to infer* from the term used by the

witness the idea *that any other proposal than that embodied in the letter is in his mind*" (R. 83). (Emphasis supplied.)

Second, the only other possible basis for an "option" argument stems from the following conclusion expressed in the next to the concluding paragraph in "The Refusal to Bargain" section of the Board's Supplemental Decision and Order:

> "The Union sought to bargain concerning a clause which would leave the final decision as to membership or nonmembership with each individual employee, *at his option*, * * *" (R. 66).

This conclusion is not based upon any finding of fact made by the Board in that Supplemental Decision and Order.[1] There is no support for it anywhere in the Record. What the Union sought is spelled out—as the Union emphasized continually on the Record—in the words of its proposal. No "option" can be found expressly or by inference in that proposal.

The Board's conclusion appears to be based upon the following groundless assumption expressed in the preliminary portions of the Board's Supplemental Decision and Order:

> "* * * the question of the legality of an agency-shop provision here must be viewed as contemplating an arrangement in which, while employment is conditioned upon payment of the equivalent of dues and fees, all employees are *given the option* of be-

[1] In rendering its Supplemental Decision and Order vacating an original 3-to-2 decision upholding the Company's position herein, the Board made no specific findings of fact and adopted from the original Decision only "the formal parts consisting of the procedural aspects of the case and the findings as to the business of the Respondent and as to the labor organization, * * *" (R. 54).

coming, or refraining from becoming, members of the Union." (R. 60-61.)

Note that the Board did not say that the Union's proposal made to General Motors *contained* an "option." It obviously could not have stretched the Record that far. Rather, it speculated that an "option" was *contemplated*. Having taken this first step, it was not difficult for the Board to make the jump to its unwarranted conclusion that the Union's proposal contained such an "option."

It is, in any event, sheer sophistry to argue that any such "option," as was erroneously read into the Union's proposal by the Board, could exist or have any meaning in a state, such as Indiana, which has a statute prohibiting the conditioning of continued employment upon membership in a labor organization.

The Union's proposal cannot be considered as some abstract proposition divorced from the factual and legal circumstances out of which it arose. Those circumstances were, of course, that the State of Indiana had a statute which prohibited conditioning continued employment upon membership in a labor organization. As a consequence, the union security arrangements in the collective bargaining agreement between the Union and the Company requiring membership of employes in the Union as a condition of continued employment could not be made operative in that State.

To circumvent this difficulty it was proposed by the Union that an agreement be entered into whereby non-member employes in the Company's Indiana plants would at least be required to pay to the Union a specified sum as a condition of their continued employment. The Board, quite as an afterthought, has said, and continues to urge, that the Union's proposal *contemplated* an "option." This

"option," it is asserted, arises from the fact that as a condition of continued employment employes could elect either to become members of the Union or, if they chose not to join, to pay a sum of money equivalent to the Union's initiation fee and monthly dues.

The difficulty with this theory, of course, is that it presents an employe with a meaningless choice. The individual cannot be compelled to make the "membership election" because of his statutory right in Indiana to refrain from membership and still hold his job. Likewise, the individual has the statutory right under Federal Law to refrain from joining or assisting the Union in order to hold his job except in accordance with an agreement meeting the requirements of Sections 7 and 8(a)(3), which agreement must have as its basic requirement membership in a labor organization—a requirement admittedly not an ingredient of an "agency shop" arrangement. Realistically, a nonmember of the Union, faced with an "agency shop" arrangement, will have no real choice but to elect union membership since, by not making such choice, he will be compelled to make money payments to the Union equal in amount to the sums paid by members, but without getting the same benefits available to those members. As developed later in this Brief, such "encouragement of membership" violates Section 8(a)(3).

It is, therefore, a mere play on words to suggest that those employes covered by the Union's proposal, if it were made effective, would have any meaningful choice or "option" open to them because a compulsory choice is no choice at all. The Union's proposal is, and can be, nothing more or less than a device to exact the equivalent of the Union's initiation fee and periodic dues as a condition of continued employment from those employes in Indiana who choose to

exercise their statutory right not to become Union members in order to hold their jobs.

B. THE "AGENCY SHOP" PROPOSAL, CONCERNING WHICH THE UNION REQUESTED THE COMPANY TO BARGAIN, IS CONTRARY TO THE FUNDAMENTAL POLICY OF THE NATIONAL LABOR RELATIONS ACT AS EXPRESSED IN SECTION 7 THEREOF.

The "agency shop" proposal, concerning which the Union requested the Company to bargain, would compel each non-union member in the bargaining unit represented by the Union at the Company's Indiana plants to pay to the Union, as a condition of continued employment, a sum of money equivalent to the initiation fee and monthly dues required of members of the Union. The Union sought, under the guise of a claimed legitimate collective bargaining demand, to persuade the Company to agree to compel employes who, by virtue of Indiana law can be placed under no legal compulsion to join the Union, to pay the equivalent of the full price of Union membership as a condition of continued employment.

Nowhere in the amended National Labor Relations Act is there language expressly authorizing or permitting employers and labor organizations to enter into an "agency shop" arrangement such as the one here proposed by the Union.

Such a bargaining demand and any agreement incorporating such a demand flies directly in the face of basic Federal labor policy as expressed in Section 7 of the National Labor Relations Act, as amended:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

> own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and *shall also have the right to refrain from any or all of such activities* • • •." (Emphasis supplied.)

Congress here declared and established in clear and unequivocal language the right of employes not only to engage in union activities and to undertake union obligations but also to enjoy their concomitant right to refrain therefrom.

What this statutory expression of basic labor policy makes clear, but is overlooked by the Union and the Petitioner in their contentions herein, is that the Act was passed primarily to secure the rights of employes and not to enhance the position of labor organizations or employers.

This was recognized as the fundamental objective of the National Labor Relations Act, even before the important 1947 amendments to the Act were added. In *National Labor Relations Board v. Schwartz*, 146 F. 2d 773, 774 (C.A. 5) the Court said:

> "Contrary to a rather general misconception, the National Labor Relations Act was passed for the primary benefit of the employees as distinguished from the primary benefit to labor unions, and the prohibition of unfair labor practices designed by an employer to prevent the free exercise by employees of their wishes in reference to becoming members of a union was intended by Congress as a grant of rights to the *employees* rather than as a grant of power to the union."

Nothing in the Taft-Hartley amendments of 1947 or in any subsequent court decision renders the foregoing observation any less true today.

If Section 7, as amended in 1947, were limited solely to the enumeration of the rights specified therein, it is undeniable that all forms of union security and, indeed, any scheme, device, or arrangement requiring an employe to engage in union activities or to render assistance in any form to a union would be unlawful as a direct infringement on the rights of employes guaranteed by that Section.

The principal clause of Section 7, standing alone, renders unlawful, *prima facie*, not only the closed shop but also the union shop and maintenance of membership, as well as the "agency shop" proposed herein by the Union. The vice inherent in each of these arrangements is that each necessarily interferes with the protected Section 7 right of employes to refrain from forming or joining or assisting labor organizations.

Accordingly, employers or labor organizations contemplating or seeking to place limitations on the exercise by employes of the rights established and guaranteed in Section 7 must find special sanction in the Act for any such restrictions or suffer the consequences of committing an unlawful labor practice.

1. The sole limitation on the exercise by employes of their Section 7 rights is found in the statutory exception to that Section wherein permission is granted to employers and labor organizations to enter into agreements requiring membership in a labor organization as a condition of employment.

Having spelled out the rights of employes in the principal clause of Section 7, Congress carved out an exception to the exercise by employes of their otherwise unqualified rights guaranteed therein, by providing that employers and labor organizations may lawfully agree to interfere

with these protected rights (including the right to refrain from assisting a labor organization) but only to the extent of requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) of the amended Act.

By the express terms of this exception, the only lawful permissible interference with the rights of employes guaranteed in Section 7 is strictly limited to agreements requiring *membership* in a labor organization and then only to such agreements requiring membership as are "authorized" in Section 8(a)(3) of the amended Act. The language does not provide that an agreement is "authorized" which requires the payment of service fees or carrying charges *in lieu of membership.* Yet this is precisely the type of agreement which the Union proposal seeks to impose upon employes in the Company's plants in Indiana. The reference in the Section 7 exception is clearly to the first proviso of Section 8(a)(3) wherein employers are permitted to make an agreement with a labor organization to require, as a condition of employment, *membership* in a union within a specified period of time providing certain other conditions, not here relevant, have been met.

Section 8(a)(3) provides in pertinent part that:

> "It shall be an unfair labor practice for an employer—
>
> • • •
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That nothing in this Act,* or in any other statute of the United States, *shall preclude an employer from making an agreement with*

> *a labor organization* • • • *to require as a condition of employment membership therein* on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, • • •." (Emphasis supplied.)

The Section 8(a)(3) proviso quoted and emphasized above spells out in language which is clear and unequivocal on its face the only type of collective bargaining agreement that may permissibly infringe upon the rights guaranteed to employes in Section 7 and not expose an employer to a violation of Section 8(a)(3). Such an agreement must be limited to conditioning continued employment upon membership in a labor organization. An examination of the quoted proviso makes it clear, without the need to resort to legislative history or other aids to determine the intent of Congress, that to condition employment on anything other than *membership* in a labor organization is contrary to the mandate of the statute.

As an exception to, or limitation on, the national labor policy of securing employe rights as specified in Section 7 of the Act, sound principles of statutory construction require that the "union security" proviso of Section 8(a)(3) be strictly construed.

It is an established rule of statutory construction that a proviso which operates to limit the application of the provisions of a statute general in terms should be strictly construed and held to include no case not clearly within the purpose, letter, or express terms of the proviso. The Supreme Court in *Spokane & Inland Empire Railroad Company v. United States*, 241 U.S. 344, 350 phrased the rule as follows:

> "But to so treat the act would be in plain disregard of the *elementary rule requiring that exceptions from a general policy which a law embodies should be strictly construed* • • •." (Emphasis supplied.)

In *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al.*, 315 U.S. 685, 694-695, the Court made the following observation concerning the construction to be placed on the first proviso of Section 8(a) of the original Act:

> "The provision for a closed shop, as permitted by §8(3), follows grammatically a prohibition of discrimination in hiring. *These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization.*" (Emphasis supplied.)

The relationship between the national policy as expressed in Section 7 and the union security exception thereto is nowhere more clearly stated than in the Board's decision in *Bryan Manufacturing Company*, 119 NLRB 502, 510; enf. 264 F. 2d 575 (C.A.D.C.); rev'd on other grounds 362 U.S. 411, wherein former NLRB Member Jenkins, in his concurring opinion, points out:

> "Union-security clauses authorized by the proviso clause of Section 8(a)(3) are in derogation of the rights guaranteed employees in the definitive statement of national policy contained in Section 7. That section emancipates employees from coercion and restraint by labor and management alike. Their right to engage in or refrain from concerted activity at their own election has been enacted into law. But while that section enacted into law their right to engage in or refrain from concerted activities at their election, the proviso clause allows a contrac-

> tual compulsion of union membership and thus restricts the free choice otherwise provided by Sections 7 and 8(a)(3). The authority so conferred by the proviso is, however, carefully circumscribed by conditions precedent to and by limits upon its exercise. As an exception to declared public policy, a union-security clause, the conditions under which it was executed, and action pursuant to it merit, when subject to dispute, strict scrutiny."

On its face, it is apparent that the Union's proposal for an "agency shop" does not involve "membership" as that term is commonly understood. Only agreements which require "membership" as a condition of employment are authorized by the quoted proviso to Section 8(a)(3). To construe that proviso as authorizing, as well, agreements which require something *other than membership* as a condition of employment would represent an unsound and offensive departure from the foregoing rule of statutory construction. Such construction would have the effect of undermining the general prohibition against discrimination which Congress spelled out in the principal clause of Section 8(a)(3) and undermining also the employe rights protected by Section 7.

The Petitioner, by arguing that the word "membership" as used in the first proviso of Section 8(a)(3) embraces an "agency shop" arrangement, has advanced the astonishing doctrine that for purposes of Section 8(a)(3) nonmembership in a union means the same thing as membership therein. This cavalier treatment of the plain words of a Congressional enactment runs contrary to the frequent instruction of this Court that in matters of statutory construction the duty of a tribunal is to give effect to the intent of Congress as expressed in the words used in the statute. *Flora v. United States*, 357 U.S. 63. When the language of a statute is clear and unambiguous, as the

Court of Appeals here concluded (R. 114), it is not necessary to consult legislative history to determine what Congress intended.

In *National Labor Relations Board v. Coca-Cola Bottling Company*, 350 U.S. 264, 268, the Court had before it the proper construction of the term "officer" as used in Section 9(h) of the amended Act. In language which can be applied with equal force to the word "membership" herein, Justice Frankfurter, speaking for the Court, said:

> "Neither §9(h) itself nor its legislative history attempts a definition of 'officers'. 'Officers' is a word of familiar usage and, (a)fter all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Certainly, it would be the uncommon man seeking to bend the statute to his own purposes who would contend that non-membership is embraced by the term "membership" as used therein. It defies the imagination to conceive of a more strained and unnatural construction.

The word "membership" as used in the amended Act is not a word of art to which Congress has attached a special meaning. It is a clear and commonly understood term designating the state or status of being admitted into an organization or society typically requiring the payment of dues, the adherence to a program, or compliance with some other requirements of membership.

As was pointed out by Mr. Justice Burton concurring in *Jencks v. United States*, 353 U.S. 657, 679:

> "• • • the essential element of membership in an organized group—(is) *the desire of an individ-*

nail to belong to the organization and a recognition by the organization that it considers him as a member." (Emphasis supplied.)

The above-quoted analysis of "membership" is particularly relevant in this case since the issue before the Court in *Jencks* was the proper construction of the word "member" as used in Section 9(h) of the same statute involved herein.[2]

In this case, of course, it has been stipulated that there are employes in the Company's Indiana plants "who do not desire to become members of the Union or its Locals, and who would not desire to make support payments to the Union or its Locals should a type of agreement such as that proposed by the Union, * * *" (R. 77) be accepted by Petitioner. Moreover, it is clear from the testimony of the Union's Vice President that the Union's Constitution does not recognize as members those persons who would make support payments pursuant to an "agency shop" arrangement (R. 90-91).

Had Congress intended to give the term "membership" some special meaning, such as that set forth in the Board's Supplemental Decision and Order, it could have done so in Section 2 of the amended Act where other words and phrases used in the Act are specifically defined. Similarly, as the Court of Appeals properly held (R. 115), had Congress intended to permit the exaction of the fees called for by the Union's proposal to the Company in lieu of union membership as a condition of employment, it could easily have so provided in apt language.

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[2] Although Section 9(h) has since been deleted from the National Labor Relations Act in the amendments thereto contained in the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525; 29 U.S.C. 159, such deletion in no way detracts from the value of Justice Burton's observation as to the nature of "membership".

2. The scope of the exception to Section 7 is not enlarged by Section 8(a)(1).

Section 8(a)(1) of the amended Act neither expands nor reduces the area of allowable bargaining spelled out in Section 8(a)(3).

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employes in the exercise of rights guaranteed in Section 7. As has been seen, the exercise of Section 7 rights is limited only by agreements requiring *membership* as authorized in Section 8(a)(3).

In the instant case, no contention is made that the Union's "agency shop" proposal is grounded upon union membership. The testimony of the Union's Vice President makes it clear that the UAW seeks an arrangement with the Company which conditions continued employment upon something other than membership in the Union (R. 82; 92).

The Union already has a valid union shop arrangement with the Company which requires generally that all employes whom the Union represents, under the provisions of the National Agreement with the Company must become and remain members of the Union to retain their jobs, but such arrangement cannot be made operative with respect to those employes represented by the Union in those Indiana plants of the Company involved here because of the Indiana "right-to-work" law. Patently, an "agency shop" agreement is designed to require non-union employes, who may not be compelled to become members,

to contribute instead financial assistance to a labor organization, as a condition of continued employment.

Because, as has been demonstrated already, the exaction sought by the Union under its proposed "agency shop" arrangement does not meet the requirements and limitations of Section 8(a)(3), it follows that any such arrangement, if made effective, would interfere with the rights guaranteed to employes in Section 7 and, as a consequence, would constitute a clear violation of Section 8(a)(1). That such would be the unlawful result is the view of this Court (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17).

3. The scope of the exception to Section 7 is not enlarged by Section 8(a)(3).

Section 8(a)(3) of the amended Act prohibits employes from engaging in any acts which have a tendency to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment. As an exception to or limitation upon this general prohibition, Congress gave to employers and labor organizations, in the first proviso of Section 8(a)(3), permission to make agreements which require, as a condition of employment, membership in a labor organization on or after the thirtieth day following the beginning of employment or the effective date of such agreements, whichever is later.

The relevant statutory language is as follows:

> "Sec. 8.(a) It shall be an unfair labor practice for an employer—
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> • • •

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein or or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *."

As an exception to the statutory prohibition spelled out in the principal clause of Section 8(a)(3), the first proviso thereto, which authorizes the execution of agreements conditioning continued employment on membership in a union, is subject to the same rules of strict statutory construction to which reference has been made earlier in this Brief (P. 21-25 *ante*). *Spokane & Inland Empire Railroad Company v. United States*, 241 U.S. 344, 350; *National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc., et al.*, 315 U.S. 685, 694-695 and *Bryan Manufacturing Company*, 119 NLRB 502, 510; enf. 264 F. 2d 575 (C.A. D.C.); rev'd on other grounds 362 U.S. 411.

In short, the only arrangements which can meet the requirements of the exception to the general statutory prohibition are those which obligate an employe either to become a member or to maintain his membership in a labor organization. Because the Union's proposal for an "agency shop" involves no such requirement of membership, it would, if incorporated into an agreement, afford the Company no protection from the full sweep of the principal clause of Section 8(a)(3) were it to enforce such an agree-

ment against employes who refuse to comply with its provisions.

The proposed "agency shop" arrangement, if made operative, would require the Company to "discriminate in regard to hire or tenure of employment or any term or condition of employment" contrary to the express prohibition of the principal clause of Section 8(a)(3).

It is likewise clear that such an "agency shop" agreement would have the effect or result, or both, of encouraging membership in a labor organization. To the extent that Union members receive benefits by virtue of their membership over and above the benefits received by "agency shop" non-members, the latter will be encouraged to seek membership as long as they are paying monthly dues anyway, in order to take advantage of the additional benefits offered Union members, particularly where, as here, the non-member must also pay the equivalent of a Union initiation fee.[3] (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17.)

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[3] What the Union here seeks would impose upon non-members and new employes the financial burden of supporting it as their representative to the same extent that it could impose such burden upon all employes it represents in a bargaining unit covered by a valid union shop provision. This is tantamount to charging for representation, contrary to the requirement imposed upon a bargaining representative "not to discriminate in the execution of its duties between its own members and employes who belong to another union *or to no union*." (Emphasis supplied.) See *Hughes Tool Co. v. National Labor Relations Board*, 147 F. 2d 69, 74-75 (C. A. 5), cited with approval in *Conley et al. v. Gibson et al.*, 355 U.S. 41, 46, wherein the Court said:

> "The Act makes no provision for paying the bargaining representatives. Where a union serves as such, it looks for its financial support to the agreement of its members to pay dues. • • • It must serve all employees alike as their representative, and secure itself in its office of representative only by the skill, efficiency, and fairness with which it executes that office."

The inequality between the rights and privileges guaranteed members and the non-members covered by the Union's "agency shop" proposal is clearly apparent from a reading of the Union's Constitution (R. 95-97), and from an examination of the testimony of the Union's Vice President at the hearing before the Trial Examiner.

As was candidly admitted by that witness in his testimony, the Union's Constitution is not written in terms of non-members—"It is written in the sense of membership" (R. 90). The Union thus readily concedes that the whole range of rights and privileges spelled out in its Constitution is designed for members only (R. 89-92). With respect to the most important of these rights of members, such as the right to participate in union meetings, the right to vote on ratification of agreements negotiated by the Union (which would include an "agency shop" agreement such as that sought here by the Union), and the right to vote on how dues money is to be allocated within the Union, it is clear that the Union has no intention of making these rights available to the non-members.

Certain other rights and privileges to which members are entitled by virtue of their membership, such as receiving the Union newspaper through which the Union advises *members*, at no additional cost to them, "as to all matters relating to wages, hours, and conditions of employment," strike benefits, participation in programs for retirees, and educational benefits, would be available to non-members, only as a matter of the Union's discretion (R. 87-90; 92).

Thus, the non-member bound by an "agency shop" arrangement such as that here proposed by the Union would no longer be a "free rider," as the Union has chosen to characterize him, but rather a second-class passenger pay-

ing first-class fare. It is submitted that this dissimilar treatment of members and "agency shop" non-members will of necessity encourage the non-members to join the Union in order to obtain the first-class accommodations for which they will have paid.

By agreeing to such an arrangement which has as its necessary effect the encouragement of union membership, the Company would violate Section 8(a)(3) of the amended Act. (*Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17.)

4. The final "proviso" of Section 8(a)(3) is inapplicable and, in any event, provides no basis for holding that the "agency shop" arrangement proposed herein is lawful.

While the Company believes the arguments already made in this Brief with respect to Sections 7, 8(a)(1) and the principal clause and first "proviso" of 8(a)(3) are dispositive of the issue in this case, the argument by the Petitioner that the final "proviso" of Section 8(a)(3) affords a basis for holding that the "agency shop" proposal herein is lawful requires comment. That the Board predicated, in part, its Supplemental Decision and Order on such an argument is indicated in its opinion where it stated:

> "* * * we are unable to distinguish, so far as its legality is concerned, the instant agency shop proposal from any other union-security proposal which predicates a right of discharge *only* upon an employee's failure to tender the equivalent of regular union dues and initiation fees." (R. 66).

That portion of the final "proviso" of Section 8(a)(3) applicable to the Petitioner's argument reads:

"• • • Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization • • •.

"(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

By its very terms, this proviso presupposes the existence of an agreement requiring membership as a condition of continued employment and then goes on to specify the minimum requirements which an employe must meet (i.e., tender of dues, etc.) in order to secure the protection from discrimination provided by Section 8(a)(3).

To read this proviso as enlarging upon the exception set forth in Section 7 of the Act so as to authorize the type of arrangement here demanded by the Union would be a deliberate distortion of the clear meaning and intent of the language used by Congress. Only by disregarding the basic language of Section 8(a)(3) and preempting powers reserved to Congress did the Board conclude that the Union's "agency shop" proposal is made legitimate by reason of this proviso.

If Section 8(a)(3) had ended with the first "proviso" thereof and the language of the final "proviso," upon which the Petitioner relies solely, was not included elsewhere in the Act, an employe under a union shop contract would be required to meet every condition of union membership in order to retain his job. Moreover, since labor organizations have control over the admission and expulsion of members, it is clear that an employe under such circumstances could be denied membership by a labor organization

for any reason, or no reason, or afforded membership only under discriminatory circumstances. If the employe were denied membership, he would also be denied a job.

The final "proviso" to Section 8(a)(3) exists only to prevent that abuse. It does not provide that something other than membership can be made a condition of employment. Nor does it say that something other than actual membership, as might be spelled out in a labor organization's Constitution or By-Laws, is to be treated as the equivalent of membership within the meaning of the first "proviso."

Where, as in the present case, no agreement is contemplated which would require membership as a condition of employment, the final "proviso" of Section 8(a)(3) can not become applicable or operative with respect to the proposal of the Union. That proviso says:

> "• • • That no employer shall justify any discrimination against an employee for *non-membership* • • •." (Emphasis supplied.)

In the absence of a contract making membership a condition of employment there can be no discrimination for non-membership. Thus, because the Union's "agency shop" proposal does not require membership as a condition of employment, a request to the Company for the discharge of an employe thereunder would be, of necessity, for failure to render financial assistance to the Union and not for non-membership therein.

What the Board has done in its Supplemental Decision and Order is to rewrite the law. But this is a responsibility which rests with the Congress as the Court of Appeals properly concluded (R. 115). Ordinarily the function of an administrative or quasi-judicial agency, such as the

Board, is to interpret and administer the statute as given to it. Where, as here, the language of the statute which is entrusted to the agency is clear and unambiguous (R. 114; See also *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17), the agency is relieved of the problems of interpretation created by possible conflicting statutory language. Here the Board has gone far beyond its responsibility and authority by abandoning its duty to administer the law as written. In essence, it has legislated rather than administered. It was this mistake which the Court of Appeals refused to compound. The transparency of the argument made by the Petitioner before the Court of Appeals that the "agency shop" was something less than a union shop compelled the Court to conclude that the proposed arrangement was not "something lesser," but, to the contrary, "entirely different" (R. 114). The proposal did not contain the essential requirement of the only form of agreement sanctioned by Section 8(a)(3) that could lawfully infringe upon the rights guaranteed to the individual worker under Section 7: namely, "membership in a labor organization." As the Court stated:

> "A Union security agreement is premised upon membership in a labor organization. An 'agency shop' on the contrary is based upon an employee paying charges in lieu of union membership as a condition of employment." (R. 114.)

C. THE COURT OF APPEALS ACTED PROPERLY IN HOLDING THAT THE CLEAR, UNAMBIGUOUS WORDS USED BY CONGRESS IN ENACTING THE STATUTE RENDERED THE "AGENCY SHOP" ILLEGAL, AND THAT RESORT TO LEGISLATIVE HISTORY TO DETERMINE WHAT THE STATUTE MEANT WAS NEITHER NECESSARY NOR REQUIRED.

A considerable portion of Petitioner's Brief is devoted to an attempt to establish the validity of the UAW's "agency shop" on the basis of legislative history.

The issue presented in this case does not involve a situation in which resort to legislative history is warranted or necessary in order to know the meaning of the statute.

The relevant statutory language is clear and unambiguous (R. 114). It requires no construction. There can be no dispute as to what the purpose of the statute is and "where the intention of the legislature is so apparent from the face of the statute there can be no question as to the meaning, there is no room for construction." (*Sutherland Statutory Construction*, 3rd Edition, Vol. 2, Sec. 4701.) "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses, and no room is left for construction." (*Swarts v. Siegel, et al.*, 117 Fed. 13, 18 (C.A. 8).) The Court of Appeals properly applied this canon (R. 115).

This Court has said in *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40-42, that "The language of §8(a)(3) is not ambiguous." Elsewhere in that same case the Court said:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§8(a)(3) and 8(b)(2) were designed to allow em-

ployees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitation Congress has chosen to impose on this right is specified in the proviso to §8(a)(3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership 'was not available to the employee on the same terms and conditions generally applicable to other members' or if 'membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.' • • • *Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned.*" (Emphasis supplied.).

General Motors continues to urge, as it did before the National Labor Relations Board, and as it did successfully before the Court of Appeals, that the language of the relevant statutory provisions should be read and applied literally.

Adherence to literalness in applying the words of a statute is not offensive in the eyes of the law as long as such literalness does not lead to an absurd result. A literal reading of the clear, unambiguous statutory language here does not produce an absurd result but, to the contrary, effectuates the fundamental policy of the Act which is to insulate the individual worker from interference with his protected right "to form, join, or assist labor organiza-

tions" or "*to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of continued employment* • • •" (Emphasis supplied.)

D. THE TWO BOARD DECISIONS AND TWO COURT DECISIONS UPON WHICH THE PETITIONER RELIES PRINCIPALLY ARE EITHER INAPPOSITE OR SUPPORT THE POSITION OF GENERAL MOTORS.

In support of its contentions, Petitioner relies principally upon four cases—two Board decisions, *Public Service Company of Colorado*, 89 NLRB 418, 419 and *American Seating Company*, 98 NLRB 800, and two court decisions, *Radio Officers' Union v. National Labor Relations Board, et al.*, 347 U.S. 17, and *Union Starch & Refining Company v. National Labor Relations Board*, 186 F. 2d 1008, (C.A. 7) cert. den. 342 U.S. 815. Examination of these decisions shows that they either are not in point for the propositions for which they are cited or, in fact, support the position of General Motors.

Petitioner first cites *Public Service* as support for the proposition that the Section 8(3) proviso of the original Wagner Act "privileged an arrangement similar to the agency shop proposal here • • •" (Pet. Brief, pp. 19-21). Although *Public Service* was decided after the Taft-Hartley amendments of 1947, the decision in fact turned upon a construction of the original Wagner Act, as Petitioner notes. The Board found "that the savings clause in Section 102 of the amended Act would operate to preserve the legality of the support money provision *if that provision was valid under the original National Labor Relations Act*, • • •" (Emphasis supplied.)

The agreement in *Public Service* called for "support payments" to the union of $2.00 per month from employes not required to become members of the union as a condition of employment. These support payments were nowhere characterized as an "agency shop" nor do they bear any close resemblance to the scheme demanded here by the UAW. There was no showing in *Public Service* that all employes, regardless of their union affiliation, did not receive the same rights and benefits from the union for their flat $2.00 per month payment. Under the "agency shop" demanded by the UAW in the instant case, employes who pay, under compulsion, sums equivalent to the Union's initiation fee and membership dues will be guaranteed none of the rights and benefits of membership enjoyed by members who pay the same amount in membership dues and initiation fees.

Public Service thus involved a different agreement than that which is here before the Court. The agreement there was also being tested against statutory language different than that involved here. Far from being controlling authority in this case, *Public Service* has little more than historical interest as an expression of what one Board's views once were on the validity of a support money provision under the Wagner Act. It did not involve a consideration of the impact which the important Taft-Hartley amendment to Section 7 would have had on the validity of the support money provision in that case or which such amendment has on the "agency shop" proposal here before the Court.

American Seating Company is next cited by Petitioner to buttress its contention that the first proviso of Section 8(a)(3), as amended by Taft-Hartley, "privileges not only the union shop but any less stringent arrangement under which employes are required to pay the equivalent of union dues and initiation fees to the union as a condition of continued employment." (Pet. Brief, p. 28)

A careful reading of *American Seating* quickly discloses the error of such a conclusion. That case arose in Michigan which did not have a statute prohibiting the conditioning of continued employment upon membership in a labor organization. The Board, as a matter of fact, found that the union shop provision in the collective bargaining agreement in *American Seating* was lawful. The Board also found that "the Petitioner does not specifically challenge the validity of the union security provisions in the contract."

The union in *American Seating* could have enforced its union shop clause with impunity. This is unlike the situation in the instant case where the UAW, unable to enforce its existing union shop arrangement in its collective bargaining agreement with General Motors because of the Indiana statute which prohibits conditioning continued employment upon membership in a labor organization, resorts to its "agency shop" proposal to frustrate that law.

On its facts, *American Seating* thus presents a wholly different problem than that in the instant case. There was no "agency shop" arrangement in that case. There was, in fact, a valid and enforceable compulsory membership requirement which the union voluntarily agreed to waive for certain religious objectors on the condition that such employes pay to the union's welfare fund sums equivalent to the dues which would have been required of them as members.

The two Board decisions thus cited by Petitioner are wholly inapposite and cannot be regarded as controlling the validity of the "agency shop" proposal made by the Union in this case.

Petitioner next makes reference to the *Radio Officers* case in support of its position that because Congress in enacting Section 8(a)(3) was concerned with the problem of "free riders," it must have intended to sanction the "agency shop." (Pet. Brief, pp. 29-34). Examination of that opinion gives no indication that the Court was suggesting anything of the kind.

In *Radio Officers*, the Court had before it the issue of whether or not the acts complained of therein encouraged union membership in violation of Section 8(a)(3). In this connection, the Court was called upon to examine the term "membership" as used in that Section. The Court first pointed out that employes are free to engage in or not to engage in union activities except to the extent that such freedom is curtailed by union security agreements meeting the requirements of Section 8(a)(3). Indeed, as Petitioner notes, the Court emphasized that "The policy of the Act is to insulate employees' jobs from their organizational rights" and that "*The only limitation Congress has chosen to impose • • • is specified in the proviso to §8(a)(3) which authorizes employers to enter into certain union security contracts* • • •" (p. 40). (Emphasis supplied.)

It was only with reference to valid Section 8(a)(3) union security agreements which conditioned continued employment upon membership in a labor organization that the Court made the further statement, quoted by Petitioner, that the "legislative history clearly indicates that Congress intended to prevent lization of union security agreements for any purpose other than to compel payment of union dues and fees."

Where, as in this case, a proposed union security agreement does not comport with the requirements of Section 8(a)(3) of the amended Act, there can be no basis for com-

pelling employes to pay union dues and fees or equivalent sums of money to a union as a condition of continued employment. Far from suporting Petitioner's contentions, *Radio Officers* is very convincing authority for the position taken herein by General Motors.

Finally, Petitioner cites the *Union Starch* case in support of the proposition that the second proviso of Section 8(a)(3) has been construed so as to equate the forms of union security permitted by the first proviso of that Section with the "agency shop" proposed by the Union in this case.

In *Union Starch*, there was in effect a lawful union shop. Employes subject to these provisions tendered their dues without satisfying other union-imposed conditions of membership and were discharged for alleged non-compliance with the union shop requirement. It was held that the minimum requirement necessary to satisfy the membership obligation under the terms of a *valid union security agreement* was the tender of initiation fees and dues. None of these facts, of course, is involved in the instant case. The *Union Starch* decision presupposes the existence of a valid union security agreement and then goes on to specify the minimum requirements which employes must meet, namely, "tender of dues," in order to secure the protection from discrimination provided by Section 8(a)(3). Neither the court in *Union Starch* nor in any other case since has taken the further step and held that the mere payment of dues and initiation fees under a valid union security arrangement is the equivalent of membership, for all purposes, so as to equate an "agency shop" with the valid forms of union security based upon membership authorized by the first proviso of Section 8(a)(3). Here again Petitioner

has relied upon authority which has no bearing on the facts here before the Court.

E. THE ONE CONTENTION ADVANCED BY THE AMICI WHICH IS DIFFERENT FROM THE ALREADY ANSWERED ARGUMENTS MADE BY THE PETITIONER IS GROUNDED PRINCIPALLY UPON INACCURATE, MISLEADING, AND IRRELEVANT INFORMATION AND DATA.*

The joint *amici*, the AFL-CIO and the UAW, attempt to justify the alleged legality of the "agency shop" in a four-pronged argument dealing with the: (1) meaning of the language of the statute; (2) legislative intent; (3) the structure and operation of one section of the statute; and (4) public policy.

The views and position of General Motors with respect to the first three of the four specified facets of the arguments of the amici have been set forth in preceding sections of this Brief. The discussion here is addressed therefore to the remaining "Public Policy" facet of the argument advanced in support of the proposition that the Court below erred in finding the "agency shop" proposal made to General Motors to be illegal. (Amici Brief, pp. 12-14.)

Having erroneously concluded in their Brief that a Wagner Act NLRB decision (*Public Service Company of Colorado*, 89 NLRB 418) and an NLRB decision handed

* At the time of the preparation of this Brief, there was still pending before the Court a Motion of the Amici AFL-CIO and the UAW for leave to file a Brief Amicus. Accompanying the Motion was the joint Brief Amicus which was to be filed for consideration in this case (No. 404) and in Case No. 368, if the Motion was granted. Not knowing what disposition the Court will make of the Motion of the amici, the following argument is included herein to answer the contentions made in the Brief Amicus insofar as they relate to the issue raised in this case only.

down after the Taft-Hartley amendment to Section 7 of the Wagner Act (*American Seating Company*, 98 NLRB 800) upheld the legality of the "agency shop", the amici make the following unqualified assertion (Amici Brief, p. 12):

> "Relying upon these decisions, the Federal Mediation and Conciliation Service has distributed a report on the agency shop for the use of its staff which not only sets forth various forms of agency shop clauses, but asserts the legality of these clauses.[5]
>
> [5] See Federal Mediation Service, *The Agency Shop* 25 (1959)."

One can conclude only that this language is intended and designed to impress upon the Court that a Federal Agency —which has as one of its principal functions the mediation and settlement of labor disputes, even to the point of suggesting forms of union security that may contribute to the solution of a management-labor controversy—has placed its official imprimatur upon, and at the same time authoritatively advised its "staff" of, the legality of the "agency shop."

This little known and not readily available "report" bears the following words on the flyleaf:

> "'In presenting this report on the agency shop, *I* have endeavored to cite documented clauses, cases and opinions as a means of effective assistance to Commissioners and others who may have interest in this variation of Union security. *The papers and the comments are those of the author, and are not*

to be interpreted as Federal Mediation and Conciliation Service policy or opinion.

Glenn C. Fleshman
Commissioner, FMCS
April 20, 1959"

(Emphasis supplied.)

This language identifies the "report" for what it is. It is a "private" document and certainly not a document of any governmental agency. It was prepared by an individual and, contrary to the impression the Brief would create, does not purport to be authored or approved by the Federal Mediation and Conciliation Service. The writer of the report cautions that the "papers and the comments" are his own, and emphasizes the caveat that what has been said is "not to be *interpreted* as Federal Mediation and Conciliation Service *policy* or *opinion*." (Emphasis supplied.)

In their Brief, immediately following reference to the aforementioned "report," the amici state (Amici Brief, pp. 12-13):

> "In the years since these decisions agency shop clauses have been included in numerous collective bargaining agreements. A survey by the BNA of 400 representative union contracts in effect as of mid-1960 disclosed that 'Agency-shop clauses are now included in 6 percent of contracts, up from 1 percent in 1957.'"

This statement extracted from a limited study of a private organization (Bureau of National Affairs) attempts to leave the impression, based upon a study of 400 contracts, that 6 percent of *all* contracts contain an "agency shop."

Had the amici included the following language which appears after the above-quoted language in the same BNA survey, there would be no basis for such an impression:

> "Half of these provisions, however, appear in conjunction with union shop clauses in contracts covering multi-state operations; the agency shop applies, to the extent that it is lawful, in those states in which union-shop arrangements are forbidden by right-to-work laws. *So the agency shop exists as the sole form of union security in only 3 percent of contracts.*" (Emphasis supplied.) (46 LRRM 14, 18.)

The Petitioner has gone even further in placing reliance upon the BNA study by asserting that arrangements of the type proposed by the Union to General Motors "are *now* written into 6 percent of collective bargaining agreements, either alone or in conjunction with the union shop" (Amici Brief, p. 14). (Emphasis supplied.) What the Petitioner has done is to update the BNA's mid-1960 figures to 1963 with no substantiating documentation.

A conclusion that 3 percent of collective bargaining agreements contain an "agency shop" provision solely is open to considerable doubt when viewed in light of the results of a study by the Federal Government of "Union Security Provisions in Major Union Contracts, 1958-59." Of 1,631 contracts examined, covering seven and one-half million workers, only 15 had clauses embodying the "agency shop" in some degree.[5]

The figures reported by the BNA, even if relevant, should have little persuasive appeal because of the small number of contracts studied. The Bureau of Labor Statistics of the United States Department of Labor estimated that in 1961, the year following that to which the BNA study related, there were approximately 150,000 collective bargaining contracts in effect in the United States.[6]

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[5] 82 Monthly Labor Review 1348, 1351—Table 2.

[6] 85 Monthly Labor Review 1136.

At stake in this case is the right of individual workers to be free from having to furnish financial support to a labor organization in order to hold their jobs, absent an arrangement requiring "membership" as a condition of employment. This right should not be determined, evaluated, or recognized on the basis of mere statistics. The livelihood of individuals should not be dealt with in such a summary manner.

Whether an "agency shop" is included in one contract or in a thousand contracts or whether those contracts cover 10 people or 100,000 people should not be determinative of the legality of the contract arrangement. The sole test is—does the statute sanction the agency shop? If it does not, 1,000 contracts containing the arrangement or the fact that many workers may have paid tribute under the arrangement for innumerable years to protect their jobs and livelihood will not establish the legitimacy of the "agency shop." Only the law should do that.

F. THE "AGENCY SHOP" ARRANGEMENT, DEMANDED BY THE UAW, BEING VIOLATIVE OF THE ACT, GENERAL MOTORS HAS NO OBLIGATION TO BARGAIN WITH RESPECT THERETO.

The Board and the courts have frequently recognized that subjects of possible collective bargaining may be divided into three general categories—those which are mandatory subjects of bargaining; those which are permissive subjects of bargaining; and those which are prohibited or illegal subjects of bargaining. The latter category includes possible subjects of bargaining which would, if embodied in a collective bargaining agreement, violate the specific language or basic policy of the Act or of some other law. It has been held repeatedly that neither party to collec-

tive bargaining is obligated to negotiate upon demands of this nature.

Thus, in *National Maritime Union of America*, 78 NLRB 971, 981-982, enf. 175 F. 2d 686 (C.A. 2) cert. den. 338 U.S. 954, the Board stated:

> "But what the Act does not permit is the insistence, * * * that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy."

Implicit in the foregoing expression is the corollary proposition that an employer is under no duty to bargain with respect to a proposal which on its face is unlawful or inconsistent with the express language or basic policy of the Act.[7]

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[7] See *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958); *NLRB v. American National Insurance Company*, 343 U.S. 395 (1952).

CONCLUSION

Because General Motors would violate the National Labor Relations Act, as amended, if it agreed to and made operative the "agency shop" arrangement demanded of General Motors by the UAW, General Motors has no statutory duty to bargain concerning it. Accordingly, the judgment of the Court below should be affirmed.

Respectfully submitted,

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March 6, 1963.